Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Petitioner,

v.

WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the Court of Appeals erred in holding that the Amended Complaint failed to state a cause of action under a state-created danger theory when all the elements under the Deshaney exception were met since the harm was foreseeable, Defendants acted in willful disregard for the safety of plaintiff and her class, a relationship existed between the state and plaintiff, and they used their authority to create an opportunity for harm that otherwise would not have existed?**

II. **Whether the Court of Appeals made an error of law in finding that the state tort wrongful death and survival actions were insufficient as a matter of law when the defendants were not entitled to immunity?**

III.. **Whether the Court of Appeals made an error of law in dismissing the state law claims against Defendant Koschalk?**

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at Appendix p.2A and was reported as Bright v. Westmoreland County. et al., 443 F.3d 276 (3d Cir.Pa.2006). Petitioner's Petition for Reconsideration and/or Rehearing was denied on May 22, 2006, per court order. The panel consisted of Third Circuit Judges Smith, Stapleton, and Nygaard. The opinion and order of the United States District Court for the Western District of Pennsylvania entered on February 25, 2005, granting Defendants' Rule 12(b)(6) motions to dismiss, appears at Appendix p. 42A.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered April 4, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.S §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Plaintiff John Bright filed this action as Administrator of the Estate of Annette Bright alleging the violation of her civil rights under 42 U.S.C. §1983 and ancillary state tort violations by defendants, Westmoreland County, probation officers, the City of Monessen and one of its police officers, the Westmoreland County Court Administrator and its District Attorney, and John Koschalk arising from the murder of Annette Bright by Koschalk who was in violation of his parole from an earlier corruption of minors charge. Included in the allegations were a claim of state-created danger with willful disregard of the Plaintiffs' safety under 42 U.S.C. §1983, state wrongful death and survivorship actions, and the state tort of assault and battery.

Initially, this case was assigned to the Honorable Arthur J. Schwab of the United States District Court for the Western District of Pennsylvania. The district court granted the Motions to Dismiss filed by Defendants Westmoreland County, Tami Whalen, Richard Yesko, Anthony C. Guinta, and John Peck, as well as Defendants City of Monessen and Carl Franzaglio and Paul S. Kuntz. The district court also dismissed all claims against Defendant Koschalk for lack of jurisdiction.

After an appeal to the Third Circuit, which yielded a reversal and remand with orders to engage in an independent judicial review of all claims and prepare an opinion explaining the reasons for its order, Bright filed an amended complaint in the district court to which all previously named Defendants responded with Renewed Motions to Dismiss. Subsequently, the district court, once again, granted the motions based upon the failure to state a cause of action and dismissed all claims against Defendant Koschalk for lack of jurisdiction.

imately, a second appeal was taken to the Third Circuit. Follow ral argument, a majority of the panel, consisting of Circuit Judges Smith, Stapleton and Nygaard, affirmed the grant o Defendants' Motions to Dismiss pursuant to Rule 12(b)(6), to which Judge Nygaard dissented. The opinion was published at Bright v. Westmoreland County. et al., 443 F.3d 276 (3d Cir.Pa.2006). In sum, the majority of the panel, in the opinion authored by Circuit Judge Stapleton, found no reversible error and otherwise affirmed that Appellant Bright had failed to state a cause of action under §1983, namely in that he failed to establish a violation of the Due Process Clause of the Fourteenth Amendment as per the state created danger exception under Deshaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189 (1989).

Upon a Petition for Rehearing, as submitted to the judges who participated in the decision of the Third Circuit Court and all other available circuit judges of the circuit in regular active service and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc the petition for rehearing was denied. Notably, Circuit Judges Rendell, Ambro and Fuentes would have granted rehearing. Also, as members of the original panel, Senior Circuit Judges Stapleton' and Nygaard's votes were limited to panel rehearing.

The facts of the case follow:

On or about March 4, 2000, Defendant Charles Koschalk, approximately 34 years of age, kept a twelve year old female overnight in his truck in the woods without the child's parents' knowledge of her whereabouts. On or about May 31, 2000 , Defendant Kolschalk entered a guilty plea to corrupting the morals of a minor and was placed upon twenty-three months probation, with credit for time served. The effective end of the probation wa

scheduled for April 30, 2002. The defendant Koschalk was placed under the supervision of the Westmoreland County Adult Probation Department which included the three individual defendant probation officers.

A specific condition of probation was that Defendant Koschalk was to have no direct or indirect contact with the twelve year old victim of the corrupting minors charge and/or any minor children (without adult supervision). Despite this condition of probation, Defendant Koschalk continued to make attempts to carry on an unsupervised relationship with the twelve year old victim.

On or about May 4, 2001, at 20:09 hrs, Defendant Probation Officer Tami Whelan personally observed and confronted Defendant Koschalk with the twelve year old victim, unsupervised, at the Target Store in Greensburg. The probation officer considered this a direct violation of the Court Order. Defendant Probation Officer Whelan prepared a report in support of a violation petition on or about May 16, 2001. On or about June 15, 2001, a formal violation document alleging the above unauthorized contact was signed by Probation Officer Richard Yesko for Probation Officer Whelan. On or about June 18, 2001, Probation Supervisor Anthony C. Guinta signed the violation document requesting that a final revocation hearing be scheduled for Defendant Koschalk. On or about June 27, 2001, a Petition to Revoke Defendant Koschalk's probation was filed through Defendant District Attorney's office by and through an assistant district attorney. On or about August 6, 2001, the Westmoreland County Court Administrator's Office issued a notice that a hearing on the Petition for Revocation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County.

However, on or about July 15, 2001, eight year old Annette

Bright was shot and killed by means of a shotgun wound to the head. She had a family relationship (sister) with the twelve year old victim of the aforementioned corrupting a minor charge. On o about January, 2003, Defendant Koschalk entered a plea of guilty to the charge of first degree murder in the homicide of Annette Bright. He has been sentenced to life in prison without parole and is currently incarcerated.

A period of approximately ten weeks expired from the dat on which the Probation Officer observed the direct violation of th Court Order and the time when the victim's relative, also a minor, was shot and killed. During this time, there was no arrest, detention, or service of papers upon Defendant Koschalk. This inexplicable delay was the responsibility of the processing system as administered by Defendants Probation Officers, Court Administrator, District Attorney and/or their staffs or personnel.

Approximately three weeks before the murder of Annette Bright, John Bright, related to the minors (father), contacted Officer Carl Franzaglio of the City of Monessen Police Department. Officer Franzaglio had been the prosecuting officer the initial corruption of minors charge against Defendant Koschal

Mr. Bright, aware that the probation officer had confronte Koschalk violating his probation by continued contact with the twelve year old victim, requested Officer Franzaglio to take immediate action to incarcerate Koschalk for the protection of his family. Defendant Officer Franzaglio assured Bright that immediate action would be taken. However, nothing occurred to detain Koschalk prior to the murder on July 15, 2001.

Koschalk murdered Annette Bright, in part, in retaliation efforts made by the family to prevent him from seeing the twelve year old relative/victim of the corrupting minors charge.

The Complaint alleges that the actions of the Defendants, individually and/or jointly, created a state-created danger and/or otherwise violated the established special relationship between the government defendants and victim of the homicide resulting in legal harm to Annette Bright and her family. More particularly:

a. An express condition of probation was for Koschalk to have no unsupervised contact with the twelve year old victim of the corrupting morals charge and/or other minors.

b. The assigned probation officer had direct knowledge that a violation of that condition had occurred on or about May 4, 2001 and specifically confronted Koschalk regarding it.

c. Despite this confrontation, Koschalk was not detained, arrested, or even notified of a revocation process until several weeks after the homicide.

d. A family member of Annette Bright, fearing harm to the family, specifically requested an arrest to the prosecuting officer and received assurances that such action would be taken immediately.

e. These affirmative actions of the Defendants served to embolden Koschalk, who despite confrontation, saw no enforcement action. Additionally, assurances of action encouraged the family's reliance upon the authorities.

f. The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or

detention in the face of known probation violations, which violations created and/or should have created immediate concern for the safety of the affected minors constituted a state-created danger and/or violation of a special relationship and/or other duty owed to the victim and her family.

The Complaint alleges that the homicide was directly and proximately caused by the affirmative acts and/or the deliberate indifference and/or failure to enforce, despite actual knowledge, th court-ordered conditions of probation. Further, the effect of direct confrontation with Koschalk, coupled with the aforementioned inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family.

The Complaint alleges a civil rights cause of action including violations of the right to due process of law and/or to be free from state-created dangers and/or non-protection in violation of legally recognized special relationships.

The Complaint alleges that Defendants Westmoreland County and the City of Monessen and individual defendant officers have established, developed, ratified, approved or otherwise encouraged by and through its agents and/or employees, the following patterns of conduct creating policies or other de facto usages, customs, practices, and procedures, including the following:

a. Defendant City of Monessen has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediat arrest procedures and/or prompt processing of revocation

petitions under circumstances evident in this case.

b. Defendant City encouraged the instant conduct by failing to take any disciplinary action whatsoever despite notice. As a result of these failures, Defendant City has failed to protect the public, including Plaintiffs, as outlined.

c. Defendant City fully ratified the conduct of police officers.

d. Westmoreland County and its policymakers has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediate arrest procedures, and/or prompt processing of revocation petitions under circumstances evident in this case.

The Complaint also set forth state tort causes of action of wrongful death and/or survivorship action against all defendants, and assault and battery against Defendant Koschalk. *See* First Amended Complaint at App., p.64 A.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether proper tests for the state-created danger exception under Deshaney are being fairly and uniformly applied in the circuit courts and whether the same support a theory of emboldenment.

Many legal scholars have recognized the problematic and erratic growth of the state-created danger theory which has arisen as an exception to Deshaney's canonical rule that the Due Process

Clause of the Fourteenth Amendment does not create an affirmative duty for state actors to protect individuals from the harm inflicted by private third parties.

As noted in a recent law review article:

> " It is evident, on a most superficial view, that a vast amount of judicial inconsistency exists among the federal circuits with regard to the state-created danger theory. Specifically, the conflicts surrounding the state-created danger concept exist on three distinct and prominent levels. First, a split exists between the circuits refusing to accept the state-created danger theory. Second, contrary conclusions about the scope and application of the state-created danger concept exist among the circuits that recognize the theory. Finally, intracircuit conflicts exist among several of the circuits recognizing the state-created danger theory. Thus, given the wide gulf of disparity among the circuits, confusion and unequal treatment of litigants living in different judicial districts inevitably occurs."

See Matthew D. Barrett, *Failing to Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations under Section 1983.* 37 Val.U.L.Rev. 177, 210 (2003).

When analyzing both the intercircuit and intracircuit conflicts, one is quick to recognize that some circuits place special emphasis on certain key elements not always recognized by other circuits. See id. at 224. One specific area of judicial inconsistency, particularly relevant to the case sub judice, involves the "action-inaction" distinction relevant to the fourth element of the Third Circuit's state-created danger test which entails a determination of whether the state actors used their authority to create an opportuni

that otherwise would not have existed for the third party's crime to occur. See id. at 225-26, and *see also* Kneipp v. Tedder, 95 F.3d 119 (3d Cir. 1996); Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir.1995); Morse v. Lower Merion Sch. Dist., 132 F.3d 902,908 (3d Cir. 1997); and Rivas v. City of Passaic, 365 F.3d 181, 197 (3d Cir.2004).

According to the aforementioned article, making the action-inaction distinction and furthermore requiring affirmative action on behalf of the state actor ignores the straightforward and explicit command of §1983's legislative history and prior Supreme Court precedent. *See* 37 Val.U.L.Rev. 177 at 226. Based upon this particular scholar's research, the spirit, intent, and purpose of §1983's enactment was to combat law enforcement inaction in the face of Klan terrorism in the post-Civil War South. See id. at 227. Moreover, in light of this Court's holding in Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), which stated that a proper regard for §1983's genesis requires that §1983 be broadly construed because it was enacted as a remedial measure, it is clear that the action-inaction distinction is fundamentally flawed. See id. at 229. As Justice Brennan stated in his dissent in Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 212 (1989), intentional inaction by a state can be just as abusive and oppressive as action. See id. at 230. In sum, the scholar opined that the action-inaction distinction "is a classic example of a distinction without a difference." Id.

In the instant case, counsel for the Petitioner expresses a belief, based on a reasoned and studied professional judgment, that the Panel's decision in Bright v. Westmoreland County, et al., 443 F.3d 276 (3d Cir.Pa.2006), is contrary to decisions of the United States Court of Appeals for the Third Circuit, as well as among other circuits, and involves one or more questions of exceptional importance, to wit: whether this Court should clarify the distinction

between the affirmative acts and omissions of state actors under the various state-created danger tests arising as exceptions to Deshaney v. Winnebago Cty. Soc.Servs.Dept., 489 U.S. 189 (1989), and further address the viability of the emboldenment theory of liability under the same.

It is respectfully submitted that the Third Circuit Panel's decision in question essentially overlooked and/or otherwise improperly disregarded the crux of Appellant's state-created danger claim by distinguishing between the allegations of affirmative and omissive conduct on behalf of the Appellees and then disposing of them in conclusory fashion. Overall, it is argued that the lower court's rationale is contrary to recent decisions of the Third Circuit which reject the affirmative act/omission inquiry as per the fourth element of the state-created danger test and stand for the proposition that the conduct must be looked at in its entirety to determine whether the state placed the plaintiff in a position of enhanced danger.

In his dissent, Judge Nygaard began by stating in pertinent part:

> "I believe that the majority incorrectly states the elements of our state created danger exception in such a way that leads them to incorrectly identify the dispositive inquiry that drives our state-created danger test. This mis-focus, in turn, has caused them to make analytical missteps in assessing the adequacy of the claim presented in this case. It is axiomatic that the pleadings in this case must be taken in their entirety in ruling upon a motion under Rule 12(b)(6). In my view, when assessed cumulatively, they establish not only the existence of affirmative acts, but more importantly, that the state used its authority to place the plaintiff in a position of enhanced danger, thereby meeting the fourth element of the state-created danger test. Hence I respectfully dissent."

See J. Nygaard's dissent at App., p. 28 A.

As noted by Judge Nygaard's dissent, and further posited by Appellant here, the Third Circuit made it clear in Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir.1997), that when addressing the question of whether a state actor has used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur, "[t]he dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or omission." Morse, 132 F.3d at 915, and *see also* J. Nygaard's dissent, App. p.32 A.

In line with the Third Circuit's shift away from the affirmative act versus omission distinction found in Morse is the holding in Rivas v. City of Passaic, 365 F.3d 181 (3d Cir. 2004). There, the circuit court determined that a reasonable fact finder could conclude that, when taken together, the conduct of the defendant EMTs in calling the police for backup, informing them that the plaintiff had assaulted them, failing to inform them of his medical condition and then abandoning control over the situation, created an opportunity for harm that would not have otherwise existed. See Rivas, 365 F.3d at 197 (emphasis added). Importantly, there was no distinction made between the so-called affirmative action of calling the police for back up and the apparent omissive action of failing to inform, instead it was held that the combination of defendants' conduct had enhanced the danger to the plaintiff, who later died as a result thereof. See id.

Similarly, in the instant case, it is clear that the lower courts were not, nor is this Court, simply faced with defendants who stood idly by letting events unfold as they may, but rather the facts as alleged, demonstrate a combination of both action and inaction that

served to create the opportunity for foreseeable harm. Appellee Probation Officer Whalen did not merely respond to a complaint and then leave the scene after witnessing no apparent crime, but instead witnessed a direct probation violation, used her authority tc confront the violator, failed to arrest and/or detain Defendant Koschalk, and then waited several weeks to file a report of the violation which resulted in an inexplicable delay of nearly ten weeks before Defendant Koschalk was even notified of a revocation hearing, unfortunately after the murder of Annette Bright. (See First Amended Complaint at paragraphs 30(h), 31, App., pp.69-70A .)

It is this very combination of action and inaction that is alleged to have served to embolden Koschalk to carry out his retaliation against the Bright family and the effect of the conduct can be seen to cut two ways. First, it can be inferred that the confrontation served to anger Koschalk by interfering with his illicit relationship with Annette Bright's sister, thus exacerbating the already contentious situation. Second, it can further be inferred that the failure to arrest or detain Koschalk, followed by the delay in reporting and processing the violation, served to embolden Koschalk, seeing no direct consequence for his actions and believing that he would not confront effective law enforcement as he progressed with his scheme to retaliate against the Bright family

The Third Circuit Panel's majority opinion makes short shrift of Bright's emboldenment theory by distinguishing between the affirmative and omissive conduct on behalf of the Defendants, ultimately isolating the allegations and then dispensing with them in conclusory fashion. In particular, the majority stated, "[t]he reality of the situation described in the complaint is that what is alleged to have created a danger was the failure of the defendants t utilize their state authority, not their utilization of it." (See Opinior at App., pp.19-20A). Moreover, Circuit Judge Stapleton concludec

that "[b]ased on the allegations of the complaint as a whole, however, one cannot reasonably infer that there was any connection between Officer Whalen's accusing Koschalk of a probation violation and Koschalk's decision to murder Annette ten weeks later." (See id. at p.20A).

The Opinion goes further to assert that even if Koschalk was emboldened by the ten week delay in processing the probation violation, "[i]t could not be reasonably attributed, however, to the probation officer's calling a probation violation a probation violation when confronted with it on May 4th." (See id.). And Judge Stapleton opines that the so-called confrontation placed the Brights in no worse position than that in which they would have been had the state not acted at all, "[i]n short, the Brights were at no greater risk immediately following the confrontation than they were when it commenced." (See id. at p.21A).

Appellant Bright respectfully submits that such conclusory findings were premature at the motion to dismiss stage of the proceedings, since he was entitled to the benefit of the inferences from his complaint. This matter should have been permitted to proceed to give Bright his opportunity to garner factual support to establish the pled theory of emboldenment. This is not an idle claim since investigation has revealed a series of letters from Koschalk which Bright believes support his theory. At a minimum, it cannot be said as a matter of law, that the emboldenment theory is unsupportable, without even the depositions of the proper parties.

Furthermore, it is contended that as alleged the Defendants served to aggravate the potentially explosive situation. The probation officer confronted the unstable Koschalk, then took no effective action. The police assured the family of an upcoming arrest, but took no effective action. The family struggled without help to discourage the illicit relationship between the 34 year old

male and their twelve year old daughter. With time, while the government dithered and delayed, this explosive mix festered and ultimately matured with the shooting death of the eight year old family member, the victim of Koschalk's unleashed retaliatory impulse. Clearly, a jury could determine that the government's affirmative act of confrontation coupled with the subsequent half measures made the situation worse. Had the government never been involved, Bright would have been starkly confronted with the choices available to protect his family: move from the area or physically confront Koschalk. But the government's half measures encouraged Bright to stay and try to rely upon the law while the situation worsened making his family the ultimate target of Koschalk's retaliation.

As Judge Nygaard noted in his dissent, the confrontation with Koschalk itself plays an integral role in creating an opportunity for harm that would otherwise not have existed and accordingly places this case outside the purview of Deshaney and firmly within the ambit of the state-created danger exception. (See Opinion at App., pp. 35-36A). Appellant Bright agrees with Judge Nygaard that by characterizing his claim as based solely on the ensuing delay in taking action, "...the majority lops off the initial affirmative act so it can conclude that there was no affirmative act. (See id. at p.36A).

Ultimately, Bright contends that such reasoning ignores the crux of his claim that the affirmative act of confrontation, similar t the initial act of the EMTs in Rivas, when viewed in combination the subsequent omissive conduct, created an opportunity for harm that otherwise would not have existed, thus satisfying the fourth element of the state-created danger test. And as Judge Nygaard reasoned, "[r]egardless of whether Bright can ultimately prove this if our test is to have any content, he is at least entitled to try." (See id.).

Additionally, and as Judge Nygaard recognized in his dissent, this appeal poses the question of whether the Third Circuit's state-created danger exception supports a theory of emboldenment, a specific question which has never been addressed head on by that court. (See Opinion at App., p.37A). Appellant Bright submits that in light of the critical importance of this question and the recognition of the "emboldenment" theory in other circuits, this Court should clarify its position on the viability of such a claim.

Considering the fact that the "emboldenment" theory has been recognized by other courts, a close review of the opinions demonstrates that the precedent strongly supports Appellant's claim that a cause of action here exists. In May v. Franklin County Board of Commissioners, 2003 WL 1134499 (6th Cir. 2003) the emboldenment theory was specifically recognized as having been sufficiently pled to create a question for the jury. The opinion provided:

> "May argues that the facts pled in her complaint establish that Ratliff's conduct increased the risk that Kirk would be deprived of life and liberty in violation of the substantive due process clause. She first says that Ratliff's behavior--going to the door, knocking, and then leaving--emboldened Moss because it diminished his fear of arrest...According the facts alleged, Ratliff's actions emboldened Moss and so increased Kirk's vulnerability to harm. She would have to prove at trial that these actions in fact emboldened Moss, but that is a question for a jury to decide. If May could show culpability, then she could proceed to a jury on that basis." Supra 793 - 794 .

The court accepted the fact that the police officers intervening in the process and then leaving without action (quite similar to the probation officer's confrontation without effective follow-up in the instant case) was sufficient to establish that the third party was emboldened so as to increase the victim's vulnerability to harm. Since the issue was raised on a motion to dismiss it was held that the pleadings were sufficient to establish that the defendant officer has a duty to protect her after emboldening the third party by going to her apartment, knocking and then leaving.

Notably, the court in May declined to go forward on the basis that those particular facts did not "shock the conscience. In making the determination of whether government action is conscience shocking, more culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure. In May, the police officer acted quickly with the murder occurring promptly after his investigation. In the instant case over ten weeks was allowed to pass, granting the officers much more time to militate against the harm which ultimately resulted. It should further be noted that the Sixth Circuit once again recognized the validity of the emboldenment theory on the same set of facts, although it was ultimately held that the plaintiff had not proven the same. See May v. Franklin County Commissioners, et al., 437 F.3d 579, 585 (6th Cir. 2006).

Additionally, Brown-Alleyne v. White, 1999 WL 1186809 at *3 (E.D.N.Y. 1999) similarly recognized the "emboldenment" theory. In material part, that opinion provided as follows:

> "Drawing all reasonable inferences in favor of the plaintiff, the complaint can be read as alleging the following. Mooney and perhaps other officers

agreed with the District Attorney's office, the Housing Authority, and the Department of Corrections not to punish White for his 1992 assault on plaintiff and not to prevent future assaults. White knew of this agreement , or at least was emboldened by the absence of repercussions, leaving plaintiff more vulnerable to future violence at his hands. When such violence occurred in 1995, the defendant police officers acted in furtherance of this conspiracy by escorting White from the building and later berating plaintiff for calling the police." (Emphasis added).

While there was a suggestion of a pre-arranged failure to act, the court, in overruling the motions to dismiss, recognized that the absence of repercussions could well serve to embolden the third party. In that case, the pre-arrangement was the triggering event to the emboldenment. In the instant case, the confrontation, like in May, was the triggering event to the emboldenment.

These cases clearly recognize that pleading a credible "emboldenment" theory is sufficient to withstand a 12(b) 6 Motion to Dismiss.

Plaintiff's First Amended Complaint added allegations, especially at paragraphs 30 f. 1-4 and 30 g. 1-2 and 30 h., establishing more clearly the factual foundation for the "emboldenment" theory. These added paragraphs follow:

f. (1) The petition to revoke probation contains the following averments by Tammy Whalen:

On May 4, 2001, at 20:09 this officer

witnessed and confronted the defendant with the victim at the Target store in Greensburg. This is a direct violation of the court order. (emphasis added).

(2) Kolschalk had been charged with corrupting the morals of Marcy Bright (Annette's sister), for the act of keeping the child overnight in a truck in the woods without her parents' knowledge of her whereabouts. Koschalk had picked her up on March 4, 2000, without parental permission; took her shopping and kept her overnight in his pick-up.

(3) Koschalk had written letters addressed to "Nut", his nickname for Marcy. In part, one letter provided, as follows:

"Feel real bad, like you really hate my guts. You don't understand, when I swear I will kill you, I mean that. You may tell your Mom and Dad or the police. By the time the cops knock on my door, I will be gone and you would better hope they catch me before I kill you and your family. I just will lose it, Nut, because I love you and will not let you go because we made plans to do things together."

(4) As noted above, the confrontation and failure of follow up, emboldened and/or encouraged Koschalk eventually to act on his misplaced emotional/psychological state. From his own correspondence his willingness to kill members of the Bright family would be encouraged when confronted with ineffective law enforcement

responses, as occurred here.

g. Approximately three weeks before the homicide,

(1) John Bright went to the Monessen Police station and spoke directly to Officer Franzaglio. Bright asked Franzaglio why Koschalk wasn't in jail. Franzaglio said he didn't know, as certainly Bright or Franzaglio would be in jail under similar circumstances. Franzaglio said he was going to District Attorney Peck for a warrant for his arrest.

(2) In reliance upon these assurances, Bright failed to take defensive actions, such as leaving the area with his family, hence creating the opportunity for the damages ultimately sustained.

h. The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or detention in the face of known probation violations, which violations created and/or should have created immediate concern for the safety of the affected minors constituted a state-created danger and/or violation of a special relationship and/or other duty owed to the victim and her family. (See Amended Complaint, App., pp. 70-72A).

A review of the case law demonstrates that Bright should have had the right to prove his allegations. See Brown-Alleyne v. White, and May v. Franklin County Board of Commissioners, supra.

Appellant Bright further directs the Court's attention to Judge Nygaard's dissent espousing his belief that the Third Circuit's state-created danger exception allows for a claim premised on the emboldenment theory. (See Opinion at App., p.37A). According to Judge Nygaard, "[t]o hold otherwise would render the state-created danger exception logically and analytically inconsistent." (See id.).

In Judge Nygaard's opinion, with which Appellant agrees, the claim in the instant case, for the purposes of the fourth element of the state-created danger test, is analogous to Rivas, supra. (See id.). The only difference is in the theory of how the claimed conduct placed the plaintiff in a position of enhanced danger, and J Nygaard saw no logical or analytical reason to allow Rivas' claim and not Bright's since the result is the same. (See id.).

Appellant Bright respectfully submits that predatory conduct by repeat offenders visited upon especially vulnerable minor children is a problem of legitimate national importance. When state probationary and law enforcement officials have actual knowledge of expressed probationary violations the law should be crafted so that they understand that willful disregard of such dangerous facts which results in actual harm to the minor population will require a thorough explanation and defense in a courtroom setting. If only one child is saved through a vigorous and fair application of the state-created danger test, the effort will be worthwhile.

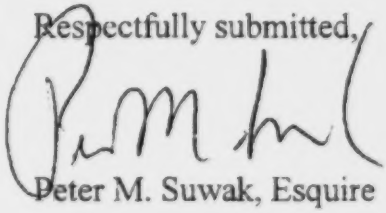
As Judge Nygaard so poignantly stated: "It is true that the Court in *Deshaney* sought impartiality in the face of 'natural sympathy.' *Deshaney*, 489 U.S. at 212. Importantly for the plaintiffs in this case, however, we should not plunder whatever merit that exhortatioin may have had. Tragedy should not incite

illegitimate influence; yet neither should it be dismissed before it has had a chance to plead its case." *See* Opinion, J. Nygaard's Dissent at App., p.39A.

CONCLUSION

Petitioner respectfully requests that this Court grant the Petition.

Respectfully submitted,



Peter M. Suwak, Esquire

APPENDIX

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PLAINTIFF'S FIRST AMENDED COMPLAINT 64A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

August 15, 2006

Mr. Peter M. Suwak
Pete's Surplus Building
P.O. Box 1
Washington, PA 15301

Re: John Bright, Individually and as Administrator of the Estate of Annette Bright, Deceased
v. Westmoreland County, et al.
Application No. 06A173

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on August 15, 2005 extended the time to and including October 19, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Sutter, Clerk
By
Heather Trant
Case Analyst

On Appeal Fr(Court
For the We i
(D.C. Civil Action No. 03-cv-01072)
District Judge: Hon. Arthur J. Schwab

Argued October 19, 2005

BEFORE: SMITH, STAPLETON and NYGAARD,
Circuit Judges

(Opinion Filed April 4, 2006)

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OPINION OF THE COURT

STAPLETON, Circuit Judge:

John Bright, on behalf of himself and his daughter Annette's estate, appeals from an order dismissing his complaint for failure to state a claim. That complaint purports to allege a Substantive Due Process claim under the "state-created danger doctrine" and several state law claims. For present purposes, we accept the facts alleged in Bright's

complaint as true. Based on those facts, we will affirm the judgment of the District Court.

I.

Thirty-four-year-old defendant Charles Koschalk ("Koschalk") pled guilty to a charge of corrupting the morals of a twelve-year-old girl, Annette Bright's sister. He was sentenced to 23 months of probation. As conditions of his probation, he was to have no contact with his 12-year-old victim and no unsupervised contact with any other minor. On probation, Koschalk was under the supervision of Westmoreland County Adult Probation Department and three of its employees – defendants Tami Whalen, Richard Yesko, and Anthony Guinta. During his probation, Koschalk continuously violated his parole by attempting to carry on a relationship with the 12-year-old victim of his crime.

The complaint alleges the following with respect to one of those probation violations and the ensuing proceedings:

> 16. On or about MAY 4, 2001, AT 20:09 hrs, Defendant Probation Officer Tami Whelan personally observed and confronted Defendant Koschalk with the twelve year old victim, unsupervised, at the Target Store in Greensburg. The probation officer considered this a direct violation of the Court Order.
>
> 17. Defendant Probation Officer Whelan

prepared a report in support of a violation petition on or about May 16, 2001.

18. On or about June 15, 2001, a formal violation document alleging the above unauthorized contact was signed by Probation Officer Richard Yesko for Probation Officer Whelan.

19. On or about June 18, 2001, Probation Supervisor Anthony C. Guinta signed the violation document requesting that a final revocation hearing be scheduled for Defendant Koschalk.

20. On or about June 27, 2001, a Petition to Revoke Defendant Koschalk's probation was filed through Defendant District Attorney's office by and through an assistant district attorney.

21. On or about August 6, 2001, the Westmoreland County Court Administrator's Office issued a notice that a hearing on the Petition for Revocation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County.

First Amended Complaint, App. at 54a-55a.

In late June, 2001, Bright called defendant Officer Carl Franzaglio of the City of Monessen Police Department to ask him to arrest Koschalk. Officer Franzaglio had some familiarity with the case because he was the prosecuting officer in the proceeding against Koschalk stemming from his crime against the 12-year-old. After Bright described the situation, Officer Franzaglio assured Bright that immediate action would be taken, but no detention of Koschalk occurred.

On July 15, 2001, before his probation revocation hearing was scheduled, Koschalk shot and killed Annette Bright, the eight-year-old sister of the victim of his earlier crime. Koschalk murdered Annette Bright to retaliate against the family for its efforts to prevent him from seeing the 12-year-old victim.

Bright's complaint concludes its statement of a claim under 42 U.S.C. § 1983 with the following allegations:

> The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or detention in the face of known probation violations . . . constituted a state-created danger . . . . The homicide was directly and proximately caused by the affirmative acts and/or the deliberate indifference and/or failure to enforce, despite actual knowledge, the court-ordered conditions of probation. Further, the effect of direct

> confrontation with Koschalk, coupled with the aforementioned inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family.

First Amended Complaint at ¶¶ 30(h), 31, App. at 58a.

In addition to the violation of Annette Bright's federal civil rights, Bright's complaint also alleges state law wrongful death and survival claims against all of the defendants and assault and battery claims against Koschalk.

The District Court granted the defendant's Rule 12(b)(6) motion to dismiss the § 1983 state-created danger claims. It concluded that these claims "must fail . . . because the state actors did not use their authority to create an opportunity for harm that would not otherwise have existed." District Ct. Op., App. at 13a-14a. The District Court also dismissed Bright's state law claims against the state-actor defendants on the ground that they were entitled to immunity under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. § 8541, *et seq.* ("PPSTCA"). Finally, the District Court declined to exercise supplemental jurisdiction over the state law claims against Koschalk. This timely appeal followed.

II.

We begin our evaluation of Bright's "state-created

danger" claim with a review of the Supreme Court's decision in *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989). Joshua DeShaney was physically abused by his father. The respondents, social workers and local officials, had ample reason to believe Joshua's father was abusing him and, at one point, secured temporary custody of Joshua. They ultimately returned Joshua to his father, however, and the violence continued, resulting in severe brain damage. Joshua and his mother "sued respondents claiming that their failure to act deprived [Joshua] of his liberty in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 191. The Supreme Court held that it did not, and affirmed a summary judgment for the respondents.

Based upon its text, history, and case law, the Court concluded that the Due Process Clause did not impose an affirmative obligation on the state to protect its citizens:

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

* * *

> Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.
>
> * * *
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

DeShaney, 489 U.S. at 195-96.

Significantly for present purposes, the petitioners in *DeShaney* contended that, even if there was no affirmative duty to protect the public generally, "a special relationship" existed between Joshua and the state giving rise to such a duty "because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger." *DeShaney*, 489 U.S. at 197. The Supreme Court expressly "reject[ed] this argument." *Id.* at 198. It held that it is only when the state takes custody of a citizen, thereby depriving him of his liberty, that it assumes an affirmative duty to protect him or her from harm.

> [Our cases] stand only for the proposition that when the State takes a person into its custody

> and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 199-200.

Applying these principles to Joshua's case, the Court concluded that the state had no duty to protect him even though state actors had, at one point, taken temporary custody of Joshua and then returned him to his father:

> Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at

> all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

DeShaney, 498 U.S. at 201 (footnote omitted).

DeShaney stands for the proposition that the Due Process Clause imposes no affirmative duty to protect a citizen who is not in state custody.[1] As the last quoted paragraph suggests, however, this does not mean that no constitutional violation can occur when state authority is affirmatively employed in a manner that injures a citizen or renders him "more vulnerable to injury from another source than he or she would have been in the absence of state intervention." *Scheiber v. City of Philadelphia*, 320 F.3d 409, 416 (3d Cir. 2003). This complement to the *DeShaney* holding has come to be known in its progeny as the "state-created danger doctrine."

Our case law establishes the following essential elements of a meritorious "state-created danger" claim:

> (1) "the harm ultimately caused was foreseeable and fairly direct;"[2]

---

[1] Bright does not invoke the "state custody" exception to the general rule of *DeShaney*. *Compare Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000) (holding that an affirmative duty to protect may exist in the context of foster care).

[2] *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996).

(2) a state actor acted with a degree of culpability that shocks the conscience;[3]

(3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general;[4] and

(4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.[5]

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[3] *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Miller v. City of Philadelphia*, 174 F.3d 368, 375-76 (1999); *Scheiber v. City of Philadelphia*, 320 F.3d 409, 416 (2003).

[4] *Kneipp*, 95 F.3d at 1209, n.22; *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906, 913 (3d Cir. 1997).

[5] *See DeShaney*, 489 U.S. at 201 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. . . . [The State] placed him in no worse position than that in which he would have been had it not acted at all"); *Rivas v. City of Passaic*, 365 F.3d 181, 195 (3d Cir. 2004) (articulating the fourth element as requiring that

It is important to stress, for present purposes, that under the fourth element of a state-created danger claim, "[l]iability under the state-created danger theory is predicated upon the states' *affirmative acts* which work to the plaintiffs' detriments in terms of exposure to danger." *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1374 (3d Cir. 1992) (*en banc*) (emphasis supplied); *Brown v. Grabowski*, 922 F.2d 1097, 1100-01 (3d Cir. 1990) (finding that *DeShaney* holds "that a state's failure to take affirmative action to protect a victim from the actions of a third party will not, in the absence of a custodial relationship . . . support a civil rights claim"). It is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause.

While we have acknowledged that the line between action and inaction may not always be clear, *D.R.*, 972 F.2d at 1374, we have never found a state-created danger claim to be meritorious without an allegation and subsequent showing

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"the state actor used his authority to create an opportunity for danger that otherwise would not have existed"). *See also* Laura Oren, *Safari into the Snake Pit: The State Created Danger Doctrine*, 13 Wm. & Mary Bill Rts. J. 1165, 1187 (2005) (arguing that this element in our Circuit's state-created danger doctrine "may be broken down into its constituent parts: (1) Did state officials exercise authority or power; (2) in such a way that they put someone in a worse position than they would otherwise have occupied?").

that state authority was affirmatively exercised.[6] Contrary to Bright's suggestion, *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir.

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[6] If there were any inconsistency in the holdings of our prior cases regarding the fourth element of a state-created danger claim, the controlling precedent would be our *en banc* decision in *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3d Cir. 1992). While acknowledging that the line between action and inaction is sometimes difficult to draw, we there affirmed what *DeShaney* clearly teaches: the Due Process Clause proscribes only state action and, accordingly, liability "under the state-created danger theory [can only] be predicated upon the state's affirmative acts which work to plaintiffs' detriment in terms of exposure to danger." 972 F.2d at 1374. We perceive no conflict, however, between *D.R.* and those cases which phrase the fourth element in terms of whether "state actors used their authority to create an opportunity that would not otherwise have existed" for injury to the plaintiff. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). In our view, "state actors" cannot "use their authority" to create such an opportunity by failing to act. *Rivas* is not to the contrary. There, two state actors, emergency medical technicians, affirmatively used their state authority to create an opportunity for injury to the plaintiff by summoning the police and providing them with information that could be expected to cause the police to treat the plaintiff's decedent in a highly dangerous manner – *i.e.*, "Garcia and Rodriguez informed the police that Mr. Rivas had assaulted one of them but did not inform the police about Mr. Rivas's medical condition or warn the officers that Mr. Rivas should not be restrained." 365 F.3d at 195. We perceive little similarity between that case and this.

1996), and *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902 (3d Cir 1997), do not indicate otherwise. In *Kneipp*, the police stopped a couple on the street in the middle of the night for causing a disturbance. The wife was intoxicated to the point of being unable to walk without assistance. While the police initially detained both of them, they subsequently gave the husband permission to go home. He departed, assuming that the police were going to take her either to the hospital or the police station. At some point after his departure, the police sent the wife home alone, resulting in her fall to the bottom of an embankment and serious injury. We affirmed, finding that there was "sufficient evidence in the summary judgment record to show that . . . the police officers used their authority as police officers to create a dangerous situation or to make [the wife] more vulnerable to danger [than] had they not intervened. . . . As a result of the affirmative acts of the police officers, the danger or risk of injury to [the wife] was greatly increased." *Kneipp*, 95 F.3d at 1209.

In *Morse*, we characterized the issue raised under the fourth element of a state- created danger claim as whether "the state actors 'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.'" *Morse*, 132 F.3d at 915 (quoting from *Marks v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995)). We affirmed the District Court's dismissal of the complaint, however, based on the plaintiff's failure to satisfy the first element of a state-created danger claim, *i.e.*, on the facts alleged, the third parties' "deadly attack was not a foreseeable and fairly direct result of defendants' behavior."

Id. at 915-16.[7]

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[7] As the dissent notes, *Morse* observes: "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission." *Morse*, 132 F.3d at 915. It is important to put this observation in context, however. This sentence appears in *Morse*'s discussion of the district court's application of the fourth element of the test. The district court identified a single alleged affirmative act—the defendants having unlocked the back door to a school through which the plaintiff's attacker entered—and expressed uncertainty as to whether this affirmative act was sufficient to establish liability. We concluded the question of whether an affirmative act was required had been answered by *Mark v. Borough of Hatboro*. *Mark* articulated the fourth element of the test as requiring that "state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). A use of authority that creates an opportunity for harm necessarily entails an affirmative act. But an affirmative act, while necessary, is not sufficient. The test also requires a direct causal relationship between the affirmative act and foreseeable harm to the plaintiff. In *Morse*, this meant asking whether unlocking the door created a foreseeable opportunity for the plaintiff to be attacked by a mentally ill intruder. Only then would the state actor have "used its authority to create an opportunity which otherwise would not have existed for the specific harm to occur." *Morse*, 132 F.3d at 914. In this context, we do not read *Morse*'s language to suggest liability can be

III.

Bright insists that the state actor-defendants caused Annette Bright's death in three ways: (1) the "inexplicable delay" by numerous state actors in pursuing the revocation of Koschalk's parole left him in a position to kill Annette; (2) Officer Franzaglio's assurance that Koschalk would be taken into custody was relied upon by Bright and resulted in Bright's failing to take steps to protect Annette; and (3) Officer Whalen's confrontation of Koschalk in May and the want of any prompt follow-up by the state actors "emboldened" him to commit a crime he otherwise would not have committed. Like the District Court, we find it unnecessary to consider anything other than the fourth essential element of a meritorious state-created danger claim.[8]

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based on an omission alone or a failure to act. We read it to clarify that the relevant test involves asking whether a state actor's behavior constituted an affirmative act, and, if so, whether the affirmative act created a foreseeable opportunity for harm.

[8]Judge Smith would hold that the motion to dismiss was also properly granted based on Bright's failure to plead facts sufficient to satisfy the first prong of the state-created danger test. In his view, the harm ultimately caused was a not "foreseeable and a fairly direct result of the state's actions." *Morse*, 132 F.3d at 908. Because the crime of corrupting the morals of a minor is different in degree and kind from the crime of murder, it is not – without more – foreseeable to a state actor that failing to detain a pedophile will result in homicide. In

We conclude that the state cannot "create danger" giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.

A.

Bright argues that this case is unique because "the probation officer personally witnessed the offending violation and was in a position to act promptly," but there was an "inexplicable delay" of ten weeks before a probation revocation hearing was scheduled. Br. Appellant at 26. This theory of liability based solely on a failure of the state to act is clearly foreclosed by *DeShaney*. Even if Officer Whalen's knowledge of the encounter at Target could be reasonably regarded as knowledge of a danger to Annette, we know from *DeShaney* that no affirmative duty to protect arises "from the State's knowledge of the individual's predicament." *DeShaney*, 489 U.S. at 200. Liability requires affirmative state action; mere "failure to protect an individual against private violence" does not violate the Due Process Clause. *Id.* at 197.

B.

Judge Smith's view, because Bright failed to allege that state officials had any knowledge of any threatening or criminal conduct except the probation violation itself, Annette Bright's murder was not a foreseeable result of the state's action.

Officer Franzaglio assured Bright approximately three weeks before Annette's death that Koschalk would be arrested and "[i]n reliance upon these assurances, Bright failed to take defensive actions, such as leaving the area with his family, hence creating the opportunity for the damages ultimately sustained." First Amended Complaint ¶ 30(g)(2), App. at 58a. State-created danger liability cannot be predicated on these facts, however. The Supreme Court has spoken directly to this matter. Bright does not, and cannot, claim that the state in any way restricted his freedom to act on his family's own behalf. The *DeShaney* Court specifically held that, under these circumstances, no "affirmative duty to protect arises . . . from the State's . . . *expressions of intent to help*" an individual at risk. *DeShaney*, 489 U.S. at 200 (emphasis added). Once again, the governing rule is that there can be no liability in the absence of an affirmative exercise of state authority.

C.

Finally, Bright alleges that the parole officer's "confrontation with Koschalk, coupled with . . . inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family." First Amended Complaint ¶ 31, App. at 58-a. Here, again, Bright seeks to bring the law enforcement delay within the scope of the state-created danger doctrine by pointing to an affirmative action of the state which preceded it. The reality of the situation described in the complaint is that what is alleged to have created a danger was the failure of the defendants to

utilize their state authority, not their utilization of it. Bright has identified no action of the defendants that utilized their state authority in a manner that rendered Annette more vulnerable to Koschalk than she would otherwise have been. It is Officer Whalen's alleged decision not to arrest in May and the ensuing ten week delay about which Bright complains. It is that failure to arrest and detain that his brief argues created the danger, made Annette's death foreseeable, and was the product of deliberate indifference.

It is true, as we have noted, that Bright's complaint alleges in conclusory fashion that it was both Officer Whalen's "confrontation with Koschalk" *and* the "inexplicable delay" that "emboldened" Koschalk. Based on the allegations of the complaint as a whole, however, one cannot reasonably infer that there was any connection between Officer Whalen's accusing Koschalk of a probation violation and Koschalk's decision to murder Annette ten weeks later. It is specifically alleged that what "emboldened" Koschalk and thereby contributed to that decision was a belief "that he would not confront effective law enforcement action as he progressed with his scheme to retaliate." First Amended Complaint at ¶ 31, App. at 58a. It is the state's creation of that belief that is said to have rendered Annette more vulnerable than she would otherwise have been. We may assume for present purposes that the creation of that belief could reasonably be attributed to the ten week delay in serving Koschalk with notice of his probation violation hearing. It could not reasonably be attributed, however, to the probation officer's calling a probation violation a probation violation when confronted with it on May 4th.

While a probation officer here took affirmative action seeking compliance with the court's protective order, just as the social workers took affirmative action to secure and then relinquish custody of Joshua DeShaney, the Due Process Clause did not require that Westmoreland County "become the permanent guarantor" of the Bright family's safety from private violence any more than it required Winnebago County to "become the permanent guarantor" of Joshua's safety from the same sort of harm. *Id.* at 201. As in *DeShaney*, the only affirmative exercise of state authority alleged in this case – the so-called "confrontation" – "placed [the Brights] in no worse position than that in which [they] would have been had [the state] not acted at all." *Id.* In short, the Brights were at no greater risk immediately following the confrontation than they were when it commenced. With respect to the ensuing delay in exercising state authority, here, as in *DeShaney*, the "most that can be said of the state functionaries in this case is that they stood by and did nothing when . . . circumstances dictated a more active role for them." *DeShaney*, 489 U.S. at 203. The confrontation was not a misuse of state authority, and the subsequent failure to exercise state authority was not a violation of the Due Process Clause under *DeShaney*.

IV.

Turning to Bright's state claims, the District Court determined that Westmoreland County, the City of Monessen, and the individual state employees were entitled to immunity from those claims. It further concluded that it should decline to exercise its supplemental jurisdiction with respect to Bright's claims against Koschalk.

On appeal, Bright does not challenge the merits of the District Court's determination that the county and city were entitled to municipal immunity. Rather, he insists that the Court, having dismissed the federal claims, should have declined to entertain any of Bright's state claims. With respect to the claims against the individual state defendants, Bright argues, in the alternative, that these defendants were not entitled to immunity under the PPSTCA. Finally, Bright insists that, if the District Court properly decided to determine the state claims against the county, the city, and their employees, it should not have abstained with respect to the claims against Koschalk.

A.

While our Court reviews district court decisions to exercise supplemental jurisdiction for abuse of discretion, *see DeAsencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003), we have also found that:

> [W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.

Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995).

The District Court recognized this rule and explained

that there were no "extraordinary circumstances" here that would "warrant the exercise of jurisdiction over the state claims" against Koschalk. App. at 19-a. While it did not expressly address why it was proceeding to exercise jurisdiction over the other state claims, we believe that the District Court's reason for distinguishing between the two classes of claims is both apparent and appropriate.

Governmental immunity – such as immunity for municipalities and for public employees acting within the scope of their duties under 42 Pa. Cons. Stat. §§ 8541, 8545 – serves the public interest in avoiding burdening the state and its employees with unnecessary litigation. Pennsylvania immunity law appears to be no exception. *See Kuzel v. Krause*, 658 A.2d 856, 858 (Pa. Commw. Ct. 1995) ("Sovereign and governmental immunity involve the constitutional question of the Commonwealth consenting to be sued and the effect those suits would have on the public purse . . . ."). *See also In re Upset Sale*, 522 Pa. 230, 232 (Pa. 1989) (finding the defense of municipal immunity non-waivable by litigants because "a governmental agency cannot be put at the mercy of negligent . . . waiver by counsel of a substantive right designed to protect its very existence"). The public interest protected by immunity doctrine has prompted our Supreme Court to advise that immunity issues should be resolved "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

Understandably, the state defendants filed their motions to dismiss the state claims on immunity grounds

shortly after learning of this action against them, and those motions were briefed and argued simultaneously with the motions to dismiss the § 1983 claims for failure to state a claim. Accordingly, at the point when the District Court concluded that the federal claims should be dismissed, it was in a position to rule without delay on the state defendants' entitlement to immunity. Given that any further delay in ruling on that entitlement would undermine an important objective of the state in recognizing such immunity, it is not surprising that the District Court exercised jurisdiction with respect to the motions of the state defendants while declining to do so with respect to Koschalk, who had no claim of immunity. In fairness to the state-actor defendants, the District Court could hardly have done otherwise.

B.

The District Court concluded that the individual state-actor defendants were entitled to immunity under PPSTCA because Bright's allegations "could not support a finding that the individual defendants 'intended to violate the law or bring about the harm that resulted to the plaintiffs.'" *Id.* at 17a (quoting from *Leidy v. Borough of Glenolden*, 277 F.Supp.2d 547 (E.D. Pa. 2003)). We agree.

Under § 8545 of the PPSTCA, a municipal employee "is liable for civil damages on account of any injury to a person or property . . . only to the same extent as his employing local agency . . . ." 42 Pa. Cons. Stat. § 8545. Local agencies are given broad immunity in 42 Pa. Cons. Stat. § 8541 which is qualified by eight exceptions that do not

apply to this case. The PPSTCA contains an additional exception from immunity where a public employee is concerned:

> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 . . . shall not apply.

42 Pa. Cons. Stat. § 8550. "Willful misconduct" – the only clause that Bright argues describes the conduct of these defendants – has recently been defined as follows:

> Willful misconduct . . . has been defined by our Supreme Court to mean conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied. . . . To prove willful misconduct, a plaintiff must establish that the actor desired to bring about the result that followed, or at least it was substantially certain to follow, *i.e.*, specific intent.

Robbins v. Cumberland County Children and Youth Services, 802 A.2d 1239, 1252–53 (Pa. Commw. Ct. 2002). Our Court has also recognized that "'[w]illful misconduct' in this

context has the same meaning as the term 'intentional tort.'" *Brown v. Muhlenberg Township*, 269 F.3d 205, 214 (3d Cir. 2001) (citing *Delate v. Kolle*, 667 A.2d 1218, 1221 (Pa. Commw. Ct. 1995) and *Kuzel v. Krause*, 658 A.2d 856, 859 (Pa. Commw. Ct. 1995)). Thus, even where a public employee acts with a degree of culpability equivalent to "recklessness," Pennsylvania law nevertheless affords him immunity. *Williams v. City of Philadelphia*, 569 A.2d 419, 421-22 (Pa. Commw. Ct. 1995) ("[T]he failure [of two public employees] to take greater precautionary measures in light of the circumstances, exemplifies a reckless disregard of the existing danger; however, that behavior constitutes wanton, not willful, misconduct. . . . [T]hey are immune from liability under section 8545 of the Code.").

Bright does not allege that the individual state defendants desired to bring about harm to Annette Bright (or to her sister) or that they were aware that such harm "was substantially certain to follow." Rather, Bright alleges in his complaint that they acted with "deliberate indifference," App. at 58a, and argues in his brief that they "knowingly and deliberately disregarded a known risk." Br. Appellant at 26. Assuming *arguendo* that a reasonable jury could infer such culpability from the facts alleged, the individual state-actor defendants would still not have engaged in "willful" misconduct and would still be entitled to immunity.

C.

Bright has pointed to no considerations of judicial economy, convenience, or fairness to the parties which would

have provided the District Court with an affirmative justification for adjudicating the claims against Koschalk after dismissing the federal claims. And we perceive none.

V.

The judgment of the District Court will be affirmed.

NYGAARD J., dissenting:

I believe that the majority incorrectly states the elements of our state-created danger exception in such a way that leads them to incorrectly identify the dispositive inquiry that drives our state-created danger test. This mis-focus, in turn, has caused them to make analytical missteps in assessing the adequacy of the claim presented in this case. It is axiomatic that the pleadings in this case must be taken in their entirety in ruling upon a motion under Rule 12(b)(6). In my view, when assessed cumulatively, they establish not only the existence of affirmative acts, but more importantly, that the state used its authority to place the plaintiff in a position of enhanced danger, thereby meeting the fourth element of the state-created danger test. Hence, I respectfully dissent.

I. The Fourth Element of the State-Created Danger Test

The majority submits that the test developed in our Circuit to assess the adequacy of a state-created danger claim contains the word "affirmatively." Specifically, they state the fourth element of the test as whether:

> (4) a state actor *affirmatively* used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Maj. Op. at 9 (emphasis added). This, quite plainly, is an incorrect statement of our test. Since *Kneipp v. Tedder*, 95 F.3d 119 (3d Cir. 1996) enunciated our state-created danger

test, not one of our cases has inserted the word "affirmatively" into the fourth element of the test.[9] *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995) ("Cases like these have four things in common: ... (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur."); *Kneipp*, 95 F.3d at 1205 (applying the *Mark* 4-part test); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 908 (3d Cir. 1997) (quoting and applying the *Mark* 4-part test); *Smith v. Marasco*, 318 F.3d 497, 506 (3d Cir. 2003) (noting the fourth element of the *Kneipp* test as, "(4)[whether] the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur."); *Scheiber v. City of Philadelphia*, 320 F.3d 409, 417 (3d Cir. 2003) (quoting the *Kneipp* test); *Rivas v. City of Passaic*, 365 F.3d 181, 197 (3d Cir. 2004) ("The last element of the *Kneipp* test asks whether the state actor used his or her authority to create an opportunity, which otherwise would not have existed, for the specific harm to occur."). The majority does not cite, nor can I find, any case or other form of support for its claim, today, that the test that our Circuit has developed

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[9]Our initial attempt to establish a test for the state-created danger exception to *Deshaney v. Winnebago Cty. Servs. Dept.*, 489 U.S. 189 (1989) can be traced to *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995) even though it has, since *Kneipp*, been known as the *Kneipp* test. Recently, Judge Ambro accurately charted modifications to our test, leading him to question the appropriateness of continuing to refer to the *Deshaney* exception as the *Kneipp* test. *See Rivas v. City of Philadelphia*, 365 F.3d 181, 202-03 (3d Cir. 2004).

includes the word "affirmatively" in the fourth element.

II. The Central Inquiry and Analysis Under the Fourth Element

By its insertion, the majority signals its belief that the hallmark inquiry under the fourth element is whether the state's actions can be characterized as affirmative or not.[10] As I address below, this assertion stands quite starkly in contrast to the dispositive inquiry for addressing the state-created danger exception established by our Court.[11]

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[10]The majority states, "[i]t is important to stress, for present purposes, that under the fourth element of a state-created danger claim, '[l]iability under the state-created danger theory is predicated upon the states' *affirmative* acts which work to the plaintiffs' detriments in terms of exposure to danger.'" Maj. Op. at 10 (citations omitted).

[11]I am not suggesting that the presence of an affirmative act does not play a part in our state-created danger inquiry. To satisfy the fourth element, there still must be something more than simple inaction by the state even "when suspicious circumstances dictate[] a more active role." *Deshaney*, 489 U.S. at 203. However, this inquiry is limited in its effectiveness. As I discuss below, to hold that the mere *presence* of omissive acts abrogates any ability to satisfy the fourth element, especially when combined with other affirmative conduct, misconceives the nature of our test and the language from which the state-created danger exception derives: "[w]hile the state may have been aware of the dangers that Joshua faced in the free world, it

Our recent cases have shifted away from inquiring into the existence of affirmative acts as a standard to establish the fourth element of our test for a compelling reason: to so hinge our inquiry would center us squarely within the troublesome decisional thicket governing the distinction between action and inaction.[12] Writing for the Court in *Morse*, Chief Judge Scirica addressed the significance of this dilemma:

> one of the common factors in cases addressing the state-created danger is that the state actors "used their

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played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

[12] When the *Mark* Court formulated, for the first time, our Circuit's test for the state-created danger exception, it did so in full recognition of the United States Court of Appeals for the Seventh Circuit's articulation in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982):

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into the snake pit.

Bowers, 686 F.2d at 618. These words ring true today. As I explain later, the claim at issue in this case is exactly that the state put a person in a position of danger and then failed to protect them. To characterize this as a merely passive act is overtly wrong.

> authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *The dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or omission.*

Morse, 132 F.3d at 915 (emphasis added) (citations omitted). In *Morse*, we rejected the affirmative act/omission inquiry because of the difficulty it posed in reaching sound conclusions. *Id.* at 914 (noting that "[c]onduct that has been held to be an affirmative act under one set of facts has not met that standard in a similar setting."). And we criticized the District Court for reading the fourth element "to contemplate that a state actor must affirmatively act to create the risk which results in harm to the plaintiff." *Id.* at 914. We also explicitly recognized that the question of whether an affirmative act is required had already been answered. *Id.* at 915 ("[w]hether an affirmative act rather than an act of omission is required ... ha[s] been answered by *Mark*"). Consequently, as *Morse* represents a controlling case, I cannot join in the majority's assertion to the contrary, that the hallmark of our test is whether the acts can be characterized as affirmative.

Morse is not the only controlling case the majority elides. *Rivas* reflects our most recent chance to address the state-created danger exception and further cements *Morse's* rejection of the affirmative act/omission inquiry. There, Emergency Medical Technicians ("EMTs") called for police backup after encountering a severely psychotic and

convulsing middle-aged man. Upon the police officers' arrival, the EMTs informed them that the man, Mr. Rivas, had assaulted one of the EMTs. They failed to advise the police, however, that Mr. Rivas had a medical condition that explained his actions, and the EMTs then abandoned control over the situation. After an altercation with the police, Mr. Rivas was placed on stretcher and at some point stopped breathing and died. We found that the EMTs' conduct, taken cumulatively, satisfied the fourth element of the state-created danger test. Specifically, we concluded that the conduct "created an opportunity for harm that would not have otherwise existed" and that "were it not for those acts, Mr. Rivas presumably could have remained in the apartment's bathroom for the duration of his seizure without incident." *Rivas*, 365 F.3d at 197.

Looking closely at the relevant conduct in *Rivas*, it is clear that our approach under the fourth element of the state-created danger exception now rests some distance away from the affirmative act/omission inquiry. In *Rivas*, the conduct we found to have met the fourth element of the test involved an initial act by the EMTs - calling and informing the officers of Mr. Rivas' assault on one of the EMTs - and then two omissions - not advising the officers of Mr. Rivas' medical condition and abandoning control over the situation. We found this conduct to have met the fourth element of the test despite, or rather in spite of, any act/omission characterization that might have been made. Thus, *Rivas* stands both for our Court's shift away from the affirmative act/omission inquiry and also for the proposition that the conduct must be looked at in its entirety to determine whether the state placed the

plaintiff in a position of enhanced danger.

Today's case presents a set of pleadings which, if proven, would establish nearly identical conduct as that analyzed in *Rivas*. Bright claims that the initial confrontation between Koschalk and his parole officer, while Koschalk was violating his parole, and then the failure by that parole officer to take appropriate action on this violation emboldened Koschalk to believe he could act with impunity in carrying out his increasingly delusional and violent threats and plans. The conduct alleged here, when taken together, contains both an initial act - the confrontation between the parole officer and Koschalk - and then an omission - the parole officer's abdication of his responsibility to take action on a clear parole violation.

We cannot simply annul *Rivas'* prescription that it is the totality of the conduct that must be analyzed under the fourth element of the state-created danger exception. The majority dismisses Bright's claim on the basis that "Bright has identified *no action* of the defendants that utilized their state authority in a manner that rendered Annette more vulnerable to Koschalk than she otherwise would have been" and that "it is the ensuing ten week delay about which Bright complains." Maj. Op. at 15 (emphasis added). I am at a loss to understand how, based on the pleadings here, the majority could claim that there is "*no action* of the defendants that utilized their state authority in a manner that rendered Annette more vulnerable" to harm. Bright has repeatedly and specifically claimed that the confrontation itself was the trigger for

increasing Koschalk's disposition to violence.[13] Had there been no confrontation but rather merely a delay of enforcement, Bright could not successfully claim that Koschalk was emboldened to act more violently.[14] Instead,

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[13]As this appeal comes to us on a Rule 12(b)(6) motion, I cannot accept the majority's conclusory dismissal of the plaintiff's allegations. Bright must only satisfy the liberal notice pleading requirements under Rule 8(a). *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002). Accordingly, we are bound not to dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 335 U.S. 41, 45–46 (1957). Additionally, we are bound to construe all reasonable inferences in favor of the plaintiff. *See id.* Thus, for the purposes of this case, we should not dismiss Bright's claims if the sum of all alleged facts would show that the state used its authority in a way that created a danger to the plaintiff or that rendered the plaintiff more vulnerable to danger than had the state not acted at all.

[14]Indeed, had Bright's claim alleged merely that the parole officer's failure to arrest Koschalk created an opportunity for harm that would not have otherwise existed, this would have been an easy case. Such a claim would clearly fail under the state-created danger doctrine, precisely because there would have been nothing to support the requirement that the state have placed the plaintiff in a position of enhanced danger. Such a pleading would be governed by *Deshaney's* rule requiring something more than mere idleness, even where circumstances

the confrontation itself plays an integral role in creating an opportunity for harm that would otherwise not have existed, placing this case outside the purview of *Deshaney* and firmly within the ambit of our state-created danger exception.

To highlight my problem with the majority's logic, if we applied it to the facts in *Rivas* it would read something like this: "the fault Rivas finds is solely with the EMTs' failure to disclose certain information and the abdication of responsibility. Because there is nothing affirmative in these acts, the claim cannot be sustained." The majority's approach, emphasizing as it does the necessity of characterizing acts as affirmative, only underscores its inadequacies. By cabining Bright's claim as based *solely* on an ensuing delay in taking action, the majority lops off the initial affirmative act so it can conclude that there was no affirmative act. I fail to understand how this analysis at all resembles the meaning of our fourth element inquiry.

Without belaboring the point more, the basis of Bright's claim is that the affirmative confrontational act, like the initial act of the EMTs in *Rivas*, taken together with the ensuing conduct, created an opportunity for harm that otherwise would not have existed, thus surpassing the threshold necessary to meet the fourth element of the state-created danger test. Regardless of whether Bright can ultimately prove this, if our test is to have any content, he is at least entitled to try.

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dictate a more active role, in order for a claim to be stated. *See Deshaney*, 489 U.S. at 203.

III. Emboldenment Claims under the State-Created Danger Exception

This appeal poses the question of whether our state-created danger exception supports a theory of emboldenment. Our Court has never addressed, head on, this specific question.

As the above analysis makes clear, Bright's claim, for the purposes of the fourth element of the state-created danger claim, is analogous to *Rivas*. Because we held that the claim in *Rivas* met the fourth element of the state-created danger test, so too, we must hold here. Implicit in my conclusion, then, is the belief that our state-created danger exception allows for a claim premised on an emboldenment theory. To hold otherwise would render the render the state-created danger exception logically and analytically inconsistent.

The majority rejects Bright's emboldenment claim by responding that, despite the pleadings to the contrary, Bright is unable to bring his claim within the state-created danger exception. This simple assertion, without more, is insufficient.

Importantly, the difference between *Rivas* and this case is not in the nature of the relevant conduct - in each case the plaintiff has pleaded a combination of affirmative acts and omissions - or in the general effect that the conduct has had on the situation - in each case the claimed effect was that the plaintiff was placed in a situation of enhanced danger.

Instead, the only difference is in the theory of how the claimed conduct placed the plaintiff in a position of enhanced danger. In *Rivas*, the alleged behavior put the plaintiff in a position of enhanced danger because the EMTs called the police and only disclosed certain information about the nature of the situation - information which affected the way the officers handled the situation - and then abandoned control over the event. We might say that this claim is premised on a theory of misrepresentation; that is, the EMTs' misrepresentation to the officers enhanced the danger to the plaintiff because it created a situation where the officers would act more violently. Here, Bright's claim is premised on a theory of emboldenment: the increased danger arose from Koschalk's confrontation with his parole officer and ensuing lack of effective enforcement because it emboldened Koschalk to act more violently.

I can see no logical or analytical reason to allow Rivas' claim and not Bright's. For the purposes of the fourth element, there is simply no functional difference between the two claims, precisely because the result is the same. In both, the state has acted to place the plaintiff in a position of increased danger. True, the claims posit different theories as to why the plaintiff was placed in a position of enhanced danger, but nevertheless, both establish the claim that, but for the state's conduct, the plaintiff would not have been placed in that position at all. Because our inquiry under the fourth element asks exactly this, both claims meet the test.

IV.

When viewed in light of our jurisprudence and our current position on the proper inquiry for the state-created danger exception, the majority's initial insertion takes on a significantly different character and changes materially our inquiry. By inserting the word "affirmatively," the majority reworks not only the actual language of our test, but also our central inquiry in light of *Morse* and *Rivas*.

Moreover, until today our case law has evidenced an unambiguous shift away from reliance on the frustratingly murky distinction between affirmative action and omission. I fear that with a single insertion, the majority succeeds in pulling us right back in. We have consciously and, I believe, prudently moved away from this distinction precisely because of the difficult and often fruitless analysis required therefrom. Thus it is true, as the majority asserts, that "[i]t is the misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." Maj. Op. at 10. But this statement proves too much. It exposes the principle, established in *Morse* and *Rivas*, that the central inquiry of our state-created danger test is whether the state placed the plaintiff in a position of enhanced danger. We cannot ignore this principle because we believe the inquiry should be something else. It is true that the Court in *Deshaney* sought impartiality in the face of "natural sympathy." *Deshaney*, 489 U.S. at 212. Importantly for the plaintiffs in this case, however, we should not plunder whatever merit that exhortation may have had. Tragedy should not incite illegitimate influence; yet neither should it be dismissed before it has had a chance to plead its case.

Upon the foregoing, I respectfully dissent.

PRECEDENTIAL

IN THE UNITED STATES COURT
OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-2005

JOHN BRIGHT, Individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,
Appellant

v.

WESTMORELAND COUNTY; TAMI WHALEN, Individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, Individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, Individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, Individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, Individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, Individually and in his capacity as District Attorney of Westmoreland County; CHARLES KOSCHALK

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Case No. 03-1072
Judge Arthur J. Schwab

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Plaintiff,

v.

WESTMORELAND COUNTY; TAMI WHALEN, Individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

MEMORANDUM OPINION

I. INTRODUCTION

This is a civil action brought pursuant to Pennsylvania Wrongful Death and Survival Acts and for violation of 42 U.S.C. § 1983. Plaintiff, John Bright, individually and in his

capacity as administrator of the estate of his daughter, decedent Annette Bright, alleges in a four count complaint that all defendants except defendant Charles Koschalk are liable to him under 42 U.S.C. § 1983 for depriving decedent and her family of their federally protected constitutional rights (Count I). Additionally, plaintiff alleges wrongful death and survival actions against all defendants except for defendant Koschalk (Counts II and III). Finally, plaintiff asserts a state law claim for assault and battery against defendant Koschalk (Count IV).[1]

On September 12, 2003, defendants filed their motion to dismiss federal cause of action with brief in support thereof. (doc. nos. 21 and 22). On September 24, 2003, plaintiff filed his response to the motion to dismiss with brief in opposition thereto. (doc. no. 23). On or about September 20, 2004, by Memorandum Opinion and Order of Court, this Court granted defendants' motion to dismiss on the basis: (1) plaintiff's complaint fails to state a cause of action for violation of 42 U.S.C. § 1983 under a state created danger theory; (2) plaintiff's wrongful death and survival actions fail as a matter of law; and, (3) plaintiff's remaining state law claims for assault and battery against defendant Koschalk must be dismissed for lack of jurisdiction.

Plaintiff appealed this Court's ruling and, on August 24, 2004, the United States Court of Appeals for the Third Circuit remanded this case for this Court to "re-evaluate the

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[1] No one has appeared of record for defendant Koshalk. According to the complaint, in January 2003, Koschalk entered a pleas of guilty to first degree murder of Annette Bright and has been sentenced to life in prison without parole. (doc. no. 48, amended complaint,¶25).

appellees' [defendants] motion to dismiss in a procedure consistent with this opinion." Bright v. Westmoreland County, 380 F.3d 729, 732 (3d Cir. 2004). Thereafter, on October 21, 2004, this Court conducted a status conference in this matter. At that time, defendants informed the Court that they intended to file renewed motions to dismiss. The Court, therefore, set a briefing schedule that was agreeable and acceptable to all parties. On December 10, 2004, defendants filed their renewed motions to dismiss with briefs in support (doc. nos. 36-41) and plaintiff thereafter filed his renewed response in opposition to the motions to dismiss with supporting brief (doc. no. 42).

In plaintiff's response in opposition to the motions to dismiss, counsel for plaintiff requested the Court entertain the option of allowing plaintiff to file an amended complaint.[2] After additional briefing on the issue of whether plaintiff was entitled to amend his complaint, on February 4, 2005, this Court entered an order granting plaintiff's motion to amend his complaint, and denying plaintiff's request for limited discovery.

Consistent with the February 4, 2005 Order, plaintiff filed his amended complaint on February 7, 2005, and the parties were allotted additional time to file supplemental or amended motions to dismiss and responses in opposition thereto. (doc. nos. 49-52).

In order to comply with the Court of Appeals'

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[2] The Court notes that plaintiff did not make a formal motion to amend at that time, but rather included that request in the body of his brief in opposition to the motion to dismiss. (Doc. No. 42).

directive, the Court will now re-evaluate defendants' renewed motions to dismiss (and supplements thereto) in a procedure consistent with its opinion. After careful consideration, and for the reasons that follow, this Court will grant defendants' renewed motions to dismiss.

II. FACTUAL BACKGROUND

For purposes of defendants' renewed motions to dismiss, this Court will accept the following allegations in plaintiff's first amended complaint as true. On May 31, 2000, defendant Koschalk (then approximately 34 years of age) pled guilty to a charge of corrupting the morals of a minor as the result of having spent the night with a 12-year-old female, who is the sister of decedent. (hereinafter referred to as "decedent's sister") (doc. no. 48, amended complaint ¶¶11 and 12). Defendant Koschalk was placed on 23 months probation, which, with credit for time served, was to last until april 30, 2002. (doc. no. 48 at ¶12). As part of his probation, defendant Koschalk was to have no contact with decedent's sister nor was he to have any contact with any other minor children without adult supervision. (Id. at ¶14).

After placed on probation, defendant Koschalk came under the supervision of the Westmoreland County Adult Probation Department, specifically, the three individual defendant probation department employees named as defendants herein. Plaintiff alleges that during the course of his probation, defendant Koschalk continued to make attempts to carry on an unsupervised relationship with decedent's sister. (Id. at ¶ 15).

On May 14, 2001, Probation Officer Tami Whalen personally observed Koschalk, who was with decedent's

sister at the Target Store in Greensburg, in violation of the terms of his probation. (Id. at ¶ 16). On May 16, 2001, Probation Officer Whalen prepared a report documenting the unauthorized contact between Koschalk and decedent's sister. On June 15, 2001, a formal document alleging a parole violation by Koschalk was signed by Probation Officer Yesko for Probation Officer Whalen. On June 18, 2001, Probation Supervisor Guinta signed the same document requesting that a final revocation hearing be scheduled for Koschalk. (Id. at ¶¶ 18-19). On June 27, 2001, a petition to revoke defendant Koschalk's probation was filed through the District Attorney's office. On August 6, 2001, the Westmoreland County Court Administrator's office issued a notice that a hearing on the Petition for Revocation of Koschalk's probation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County, Pennsylvania. However, prior to the scheduled hearing on the petition for revocation of parole, on July 15, 2001, defendant Koschalk shot and killed decedent, Annette Bright. (Id. at ¶¶ 20-22)

Plaintiff alleges that approximately three weeks before decedent Annette Bright's murder, he contacted Officer Carl Franzaglio of the City of Monessen Police Department (who had made the arrest precipitating Koschalk's guilty plea on May 31, 2000) and requested that Officer Franzaglio "take immediate action to incarcerate Koschalk for the protection of his family." (Id. at ¶¶ 26-27). Plaintiff alleges that Officer Franzaglio assured him that immediate action would be taken bout nothing occurred to detain Koschalk prior to the events of July 15, 2001. Plaintiff alleges that one of Koschalk's motives for murdering Annette Bright was to retaliate against plaintiff and his family for efforts they made to prevent him from seeing decedent's

sister following the incident for which Koschalk pled guilty in May of 2000. (Id. at ¶ 28).

Based on these facts, plaintiff alleges that had defendants acted sooner to arrest and incarcerate Koschalk for his probation violations, he would not have had the opportunity to murder the decedent on July 15, 2001. Plaintiff contends that the probation department defendants failed to take timely steps to revoke Koschalk's probation prior to Annette Bright's death. Plaintiff further contends that Officer Franzaglio, and his employer, the City of Monessen, are liable to him as a result of Officer Franzaglio's failure to arrest Koschalk for the alleged probation violation prior to decedent's death. Plaintiff contends that defendants Paul S. Kuntz, the Westmoreland County Court Administrator, and John Peck, the District Attorney, are liable to him because they unreasonably delayed the scheduling of defendant Koschalk's probation revocation hearing. Finally, plaintiff alleges that defendants actions and inactions "served to embolden Koschalk, who despite confrontation, saw no enforcement action." Id. at ¶ 30.

III. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court accepts as true all allegations in plaintiff's complaint and all reasonable inferences that can be drawn therefrom after construing them in the light most favorable to the non-movant. Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). "In determining whether a claim should be dismissed under Rule 12(b)(6), the Court should only look to the fats alleged in the Complaint and its attachments without reference to other parts of the record."

Id. Dismissal is not proper unless "it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiffs' allegations." Id.

The Court is not required to credit or lend credence to "mulled allegations" or "legal conclusions." Morse v. Lower Merion School Dist., 132 F.3d 902, 905 (3d Cir. 1997). In ruling on a Rule 12(b)(6) motion, courts can and should reject "legal conclusions," "unsupported conclusions," "unwarranted references," "unwarranted deductions," "footless conclusions of law," and "sweeping legal conclusions in the form of actual allegations." Id. at 907, n. 8. "Legal conclusions masquerading as factual conclusions will not suffice to circumvent a motion to dismiss." Id. (quoting Fernandez-Montes v. Allied Pilit Assocs., 987 F.2d 278, 284 (5th Cir. 1983)).

IV. ANALYSIS

Plaintiff contends in count I of the amended complaint that defendants (except for defendant Koschalk) are liable for violations of 42 U.S.C. § 1983. It is apparent from the allegations of the amended complaint, and confirmed by plaintiff's brief in opposition to the motions to dismiss, that he is attempting to establish the liability of the moving defendants by contending that their alleged actions and/or inactions created a danger for Annette Bright that she would not otherwise have faced had the moving defendants not acted as alleged. Plaintiff has added allegations in his amended complaint that defendant Koschalk was "emboldened" by defendant's actions and/or inactions in failing to detain him, despite their knowledge of his probation violation, and despite their assurances to plaintiff that such action would be taken promptly. Plaintiff also claims that

defendants established, developed or encouraged the custom, policy and/or procedure of failing to provide adequate training and instruction in the enforcement of probation violations under the circumstances evidence in this case. (doc. no. 48,¶¶ 31 and 35).

According to plaintiff, his "emboldenment" theory and the allegations in support thereof, are sufficient to withstand defendants' motions to dismiss, and therefore, he claims that the moving defendants are liable for the death of Annette Bright under § 1983 based upon the law established by the United States Supreme Court in DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989) and its progeny. See Kniepp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996)(Court of Appeals first adopted the theory of state-created danger).

(1) Origins of the state-created danger theory

A state actor generally owes no duty to protect an individual against violence from a third person, since the Supreme Court has determined that the Due Process Clause imposes no duty on a state actor to provide members of the general public with adequate protective services. The Due Process Clause has been interpreted to serve as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195.

In DeShaney, the Supreme Court held that simply because a state actor releases a person he or she had previously taken into custody, the state actor does not, *ipso facto,* owe a continuing duty to protect the person or others

from the person. In that case, county officials removed a child from his home, but later returned him to the custody of his abusive father. The father subsequently beat the child to death. The child's mother then sued the county officials claiming that the child's civil rights were violated by their failure to continue to protect the child and by the release of the child from custody. The Supreme Court rejected the mother's claims, stating:

> That the State once took temporary custody of [the decedent] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Id. at 201.

In the instant case, plaintiff alleges that the moving defendants should have taken the affirmative sep of arresting and/or incarcerating Koschalk for an alleged probation violation before he murdered Annette Bright, and that their failure to do so, combined with the hollow assurances provided to plaintiff that they would take prompt action to incarcerate defendant Koschalk, served to embolden Koschalk (doc. no. 48, amended complaint ¶ 30).

It is well-settled that the fact that the moving defendants had been involved with Koschalk's prior arrest and/or probation does not create any continuing duty on the part of the moving defendants to prevent Koschalk from ever committing any other crime. The crux of the issue, then, is whether defendants' assurances to plaintiff that they would seek to arrest Koschalk, combined with their failure to do so,

is sufficient to make out a claim that the state created this danger.

(2) Elements of the state-created danger theory set forth in Kneipp

In Mark v. Borough and Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) and later in Kniepp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996), the Court of Appeals for the Third Circuit considered and clarified the theory of state-created danger established in DeShaney. In Kneipp, the Court set forth that the state-created danger theory of liability requires plaintiff to establish the following four elements:

1. Whether the harm ultimately caused was foreseeable;

2. Whether the state actors acted in willful disregard for the safety of the plaintiff;

3. Whether some relationship existed between the state and the plaintiff; and

4. Whether the state actors used their authority to create an opportunity for harm that would not otherwise have existed.

Kneipp v. Tedder, 95 F.3d 1199, 1201.

The Courts in this jurisdiction, in analyzing whether a plaintiff's civil rights claim could survive on the basis of the state-created danger theory, have focused their analysis on the

factors set forth in Kneipp. Sanford v. Stiles, 2004 WL 2579738 (E.D. Pa. 2004); Kepner v. Houstoun, 164 F.Supp. 2d 494 (E.D. Pa. 2001); Jones v. City of Philadelphia, 185 F. Supp. 2d 413 (E.D. Pa. 2001).

(3) Recent modifications to the Kniepp test

Under the most modern rendition of the Kniepp test, as recently set forth in Rivas v. City of Passaic, 365 F.3d 181, 194-196 (3d Cir. April 26, 2004)(Ambro., J. concurring), plaintiff must show that:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) the conduct of the state official was "so ill-conceived or malicious that it shocks the conscience" or at least rose to the level of deliberate indifference:
>
> (3) there existed some relationship existed between the state and the plaintiff; and
>
> (4) the state actor used his or her authority to create an opportunity for danger that otherwise would not have existed.

Id. at 196.

The concurrence in Rivas stated that recent and substantial modifications to the Kniepp test have called into question whether that test is still good law. Id. at 202. For example, with regard to element number two, based upon the

Supreme Court decision in County of Sacremento v. Lewis, 523 U.S. 833, 845-47 1998, a state actor will only be liable for conduct that "shocks the conscience"; it is no long enough that he or she acted in "willful disregard" of plaintiff's safety (element two under Kniepp). Id. at 202. As the concurrence in Rivas emphasized, changesin the third and fourth prongs of the Kniepp test have expanded the state-created danger doctrine, while the substitution of "shocks the conscience" language for "willful disregard" in the second prong have limited the state-created danger doctrine.[3]

In Leidy v. Borough of Glenolden, 277 F.Supp. 2d 547 (E.D. Pa. 2003), a decision which was recently affirmed by the Court of Appeals in an unpublished opinion, 2004 WL 2677158 (3d Cir. November 24, 2004), the District Court analyzed the Kniepp factors in a case with factual similarities to the present situation. In that case, Gerald Bennett served 11 ½ months in prison for indecent assault and simple assault before being released on parole in March of 1999. As a condition of his parole, Bennett was required to participate in sex offender treatment classes. A bench warrant was issued when Bennett failed to participate in the program. Bennett subsequently appeared at the Glenolden Borough Police Station to surrender himself on the bench warrant. Although a dispatcher advised a Glenolden Borough police officer that the bench warrant existed, a hard copy of the

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[3] For example, with regard to the third prong, in Morse v. Lower Merion School District, 132 F.3d 902 (3d Cir. 1997), the Court suggested that there may be a "relationship" between the state and plaintiff simply because plaintiff was a foreseeable victim, either individually or as a member of a discrete class. Id. at 914.

warrant could not be located. As a result, the police advised Bennett that he was being released and suggested that the turn himself in the following day to the Probation Officer. Bennett subsequently left the police station without having been asked for his address which was required for the standard police incident report. Minutes after Bennett left the police station, the Glenolden Borough Police Department was advised that the hard copy of the warrant had been located. Although the Glenolden police officer who had been dealing with Bennett immediately went out to search for Bennett, he was unable to locate him. Six days later, Bennett fatally strangled Roxanne Leidy and raped her thirteen-year-old daughter. Leidy and her daughter lived in a nearby apartment building and Bennett resided with them.

The District Court in Leidy granted the defendants' motion for summary judgment holding, *inter alia,* that the defendants could not be held liable under the state-created danger doctrine because none of the defendants acted to create or increase the danger imposed by Bennett, the parolee, nor were his female victims any more foreseeable as victims than the female public at large. The District Court in Leidy based its extensive analysis primarily upon DeShaney and Kniepp.

In affirming the District Court's grant of summary judgment, the Court of Appeals focused its analysis on the fourth element of the state-created danger analysis because it was the "fundamental reason" the District Court rejected plaintiff's civil rights claim. Leidy, 2004 WL 2677158 at *3.

(3) Application

This Court has serious doubts that plaintiff can establish: (1) that the harm caused was "foreseeable" and

"fairly direct" (element one); (2) that the state actors conduct "shocks the conscience" (element two); or (3) that there existed some relationship between the state and plaintiff (element three), as required by the recent modifications to the Kniepp test set forth in Rivas, supra.[4] However, the Court will not address elements one, two and three, because, much like the District Court in Leidy, we find that the "fundamental reason" that plaintiff's claim must fail is because "the state actors did not use their authority to create an opportunity for harm that would not otherwise have existed." Leidy, 2004 WL 2677158 at *3 (citing Leidy, 277 F.Supp. 2d 547 (E.D. Pa. 2003)).

Plaintiff argues that the moving defendants' failure to arrest and/or incarcerate Koschalk for violating his probation prior to the murder "emboldened" Koschalk by making him believe that no action would be taken against him. This conclusion would require this Court to infer that plaintiff has read Koschalk's mind. This is not a reasonable inference.

Furthermore, our research has revealed that plaintiff's theory of "emboldenment" has not been accepted by any other court in this jurisdiction. Plaintiff argues that the Court of Appeals in Leidy v. Borough of Glenolden, 2004 WL 2677158 (3d Cir. November 24, 2004), "specifically recognized the potential validity of the emboldenment theory," when it stated:

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[4] The Court recognizes that the recent modifications to the Kniepp test have potentially broadened the state-created danger doctrine. Nonetheless, we note that plaintiff was not a foreseeable victim either individually or as a member of a discrete class. The only foreseeable victim, if there was one, would have been decedent's sister. Furthermore, plaintiff, as a minor, was not part of a discrete class of persons.

> The plaintiffs contend that the Glenolden Defendants did not simply fail to protect the Leidys; rather, they assert that the "something more" was that the defendants' failure to arrest Bennett placed the victims in harm's way by emboldening Bennett to commit these extreme acts of violence. The plaintiffs further hypothesize that the warrant itself "placed stressful influences on Bennett," and that his "narrow [] escape" from police after the warrant's issuance may have led Bennett "to believe that he could thumb his nose at the Courts, Probation Office, and society thus making Bennett's heinous crimes more likely.
>
> The plaintiffs' implausible conjecture, so far removed from the evidence, could not lead a factfinder to reasonable conclude that the defendants' conduct "placed the plaintiff in a dangerous position that was foreseeable."

Leidy, 2004 WL 2677158 at *4.

We decline plaintiff's invitation to find that the above-cited language evidences a decision by the Court of Appeals to accept an "emboldenment" theory to establish a state created danger. Plaintiff is attempting to assert that the defendants' combination of action an inaction sufficiently "emboldened" defendant Koschalk. However, these assertions do not accomplish plaintiff's goal because regardless of whether the state actions are characterized as affirmative acts or omissions, the necessary inquiry remains, "whether the state in some way placed the plaintiff in a

dangerous position that was foreseeable." Leidy, 2004 WL 2677158 at*3 (citing Morse, 132 F.3d at 915).

The fact remains that the moving defendants were acting to revoke Koschalk's probation, even if it was not at a pace that plaintiff suggests was proper. In the instant case, the state actors are not alleged to have placed Annette Bright into Koschalk's custody or to have interfered with the enforcement of an order pertaining to Annette Bright. The moving defendants' alleged failure to arrest Koschalk on his probation violation in a more expeditious manner did not create an opportunity for Koschalk to kill Annett Bright that would not have existed but for their exercise of authority, nor did they place plaintiff in a dangerous position that was foreseeable.

Defendants City of Monessen and Franzaglio have presented authority and case law which demonstrate that the officer did not have the authority to arrest Koschalk for a probation violation. The case law cited by Defendants Franzaglio and the City of Monessen indicates that a municipal police officer in Pennsylvania does not have the authority to make a warrantless arrest of a suspected probation violator unless the probation officer requests the officer to make the arrest. Commonwealth v. Pincavitch, 214 A.2d 280 (Pa. Super. 1965). and Commonwealth v. Lyon, 555 A.2d 920 (Pa. Super. 1989). Plaintiff's amended complaint neither avers nor implies that Officer Franzaglio was requested by a probation officer to arrest Koschalk. As a result, plaintiff is unable to show the Defendants Franzaglio or the City of Monessen could have acted to create a danger that did not already exist.

The allegations in plaintiff's amended complaint,

even when construed in a light most favorable to plaintiff as the non-moving party, fail to show that the moving defendants' actions and/or omissions neither created the danger that defendant Koschalk would commit a crime against Annette Bright that did not otherwise exist, nor did they place plaintiff in a dangerous position that was foreseeable. Nothing that the moving defendants did or did not do placed Annette Bright in **more** danger than she would have faced had the defendants never been involved with Koschalk's probation violations. Annette Bright had no constitutional right to be protected from the criminal acts of third persons and, therefore, was not deprived of a constitutional right by any of the moving defendants. See DeShaney, 489 U.S. 189, 109 S.Ct. 998 (1989). For these reasons, plaintiff's Section 1983 claims against the moving defendants must be dismissed.

B. Plaintiff's Wrongful Death and Survival Actions Fail as a Matter of Law.

Plaintiff also states pendent causes of action against the moving defendants for Wrongful Death and Survival. (Plaintiff's amended complaint, counts II and III). Plaitniff's claims against Westmoreland County and the City of Monessen are barred by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S. §8541 et seq. ("P.S.T.C.A.") The P.S.T.C.A. only waives municipal immunity as to negligence claims based upon eight narrow exceptions found in 42 Pa.C.S. §8542(b)(1)-(8). Plaintiff's claims do not fall in any of the exceptions and are, thus, barred.

Plaintiff's state law claims against the individual moving defendants are also barred by the P.S.T.C.A. The

plaintiffs in Leidy made state law claims in addition to their DeShaney claim. The District Court in Leidy granted summary judgment as to the state law claims brought against the Borough's employees based upon the P.S.T.C.A. The plaintiffs, in Leidy, alleged that the individual officers were liable for negligent infliction of emotional distress. The District Court found that the plaintiff's allegations could not support a finding that the individual defendants "intended to violate the law or bring about the harm that resulted to the plaintiffs." Leidy, 277 F. Supp. 2d at 568. As a result, the District Court found that the provisions of the P.S.T.C.A., 42 Pa.C.S. §§8541-42, 8545, and 8550, barred the plaintiffs' claims. In the instant case the result is identical.

Any negligence claim against the moving defendants must meet an exception to the immunity provided in the P.S.T.C.A. This Court finds no such exception applicable as to Westmoreland County and/or the City of Monessen. Similarly, as the District Court in Leidy found, the individual moving defendants have not been alleged to have knowingly violated a law, intended to cause harm to Annette Bright, or engaged in any "willful misconduct". 42 Pa.C.S. §8550. As a result, plaintiff's claims are barred by the provisions of the P.S.T.C.A.

The Pennsylvania Wrongful Death and Survival Act, 42 Pa.C.S. §§ 8301 and 8302 were enacted to allow the survival of viable causes of action for bodily injury to a deceased, beyond the life of the victim. (See generally Baumgart v. Keene Building Products Corp., 633 A.2d 1189 (Pa. Super. 1993)). The Wrongful Death and Survival Act did not create a new theory of liability but merely allowed a tort claim of the decedent to be prosecuted. As a result, plaintiff in the instant case must state all the elements of a

valid tort theory and such theory is subject to the defenses to that theory. Thus, if the underlying tort theory is barred by immunity, then the wrongful death or survival claim will fail. Because we have found that municipal immunity applies, plaintiff's wrongful death and survival claims must be dismissed for failing to state a claim.

C. Plaintiff's Remaining State Law Claims Against Defendant Koschalk Must be Dismissed for Lack of Jurisdiction.

The only claims yet to be disposed of in the case are a survivorship action and assault and battery claims against defendant Koschalk (part of Count III and Count IV). Plaintiff brings both of these state claims, requesting that this Court exercise pendent jurisdiction over the matters. However, absent extraordinary circumstances where the federal causes of action are dismissed the district court should "ordinarily refrain from exercising pendent jurisdiction [over state law claims]." Rolo v. City Investing Co. Liquidating Trust, 845 F.Supp. 182, 215 (D.N.J.1993), aff'd 43F.3d 1462 (3d Cir. 1994) (citations omitted). See also Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995)("where the claim over which the District Court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so."); Angst v. Mack Truck, Inc.. 969 F.2d 1530 (3d Cir. 1992) (once all federal claims have been dropped from the case, the case should be dismissed or transferred to the appropriate Pennsylvania Court of Common Pleas pursuant to 42 Pa.C.S. § 5103(b)),

There are no "extraordinary circumstances" which warrant the exercise of jurisdiction over the state claims, and this Court declines to exercise supplemental jurisdiction over the survivorship and assault and battery claims against defendant Koschalk. Plaintiffs may attempt to pursue these claims in state court pursuant to 42 Pa.C.S. § 5103(b). See Williams v. F.L. Smithe Mach. Co., 395 Pa. Super. 511, 577 A.2d 907 (1990).

An appropriate order follows.

Arthur J. Schwab
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Case No. 03-1072
Judge Arthur J. Schwab

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Plaintiff,

v.

WESTMORELAND COUNTY; TAMI WHALEN, Individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

ORDER OF COURT

And now, this 25th day of February, 2005, for the reasons set forth in the accompanying memorandum opinion, defendants' renewed motions to dismiss and supplements thereto (doc. nos. 40, 49, 50, 52) are HEREBY GRANTED

The Clerk shall thereby mark the docket as CLOSED.

Arthur J. Schwab
United States District Judge

cc: All counsel of record

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,	:	
	:	
v.	:	No. 03-1072
	:	Judge Schwab
WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Please; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,	:	

FIRST AMENDED COMPLAINT

AND NOW comes Plaintiff John Bright, Administrator of the Estate of Annette Bright, by and through his Counsel, Peter M. Suwak, Esquire, who files the

following Complaint, based upon the following:

INTRODUCTION

1. Plaintiff John Bright is an adult individual with his residence at 912 Somerset Street, Monessen PA 15062. John Bright is the natural father of Annette Bright and is the Administrator of the Estate of Annette Bright, deceased.

2. Defendant Westmoreland County is a duly organized Third Class county in the Commonwealth of Pennsylvania with offices at N. Main Street, Greensburg PA 15601

3. Defendant Tami Whalen is an adult individual who is a Probation Officer for the Westmoreland County Probation Office which has an office in the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

4. Defendant Richard Yesko is an adult individual who is a Probation Officer for the Westmoreland County Probation Office which has an office in the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

5. Defendant Anthony C. Guinta is an adult individual who is a Probation Supervisor for the Westmoreland County Probation Office which has an office in the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

6. Defendant City of Monessen is a duly organized municipal body with offices at 100 3rd Street, Monessen PA 15062.

7. Defendant Carl Franzaglio is a police officer for the Police Department of the City of Monessen with offices at 100 3rd Street, Monessen PA 15062.

8. Defendant Paul S. Kuntz is the Court Administrator for the Court of Common Pleas of Westmoreland County with offices at the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

9. Defendant John Peck is the District Attorney of Westmoreland County with offices at the Westmoreland County Courthouse, N. Main Street, Greensburg PA 15601.

10. Defendant Charles Koschalk is an adult individual presently incarcerated with the Commonwealth of Pennsylvania prison system.

STATEMENT OF FACTS

11. On or about March 4, 2000, Defendant Charles Koschalk, approximately 34 years of age, kept a twelve year old female overnight in his truck in the woods without the child's parents' knowledge of her whereabouts.

12. On or about May 31, 2000 Defendant Kolschalk entered a guilty plea to corrupting the morals of a minor and was placed upon twenty-three months probation, with credit for time served. The effective end of the probation was scheduled for April 30, 2002.

13. The defendant Koschalk was placed under the supervision of the Westmoreland County Adult Probation Department which included the three individual defendant probation officers.

14. A specific condition of probation was that Defendant Koschalk was to have no direct or indirect contact with the twelve year old victim of the corrupting minors charge and/or any minor children (without adult supervision).

15. Despite this condition of probation, Defendant Koschalk continued to make attempts to carry on an unsupervised relationship with the twelve year old victim.

16. On or about May 4, 2001, at 20:09 hrs, Defendant Probation Officer Tami Whelan personally observed and confronted Defendant Koschalk with the twelve year old victim, unsupervised, at the Target Store in Greensburg. The probation officer considered this a direct violation of the Court Order.

17. Defendant Probation Officer Whelan prepared a report in support of a violation petition on or about May 16, 2001.

18. On or about June 15, 2001, a formal violation document alleging the above unauthorized contact was signed by Probation Officer Richard Yesko for Probation Officer Whelan.

19. On or about June 18, 2001, Probation Supervisor Anthony C. Guinta signed the violation document requesting that a final revocation hearing be scheduled for Defendant Koschalk.

20. On or about June 27, 2001, a Petition to Revoke Defendant Koschalk's probation was filed through Defendant District Attorney's office by and through an assistant district attorney.

21. On ~~or~~ about August 6, 2001, the Westmoreland County Court Administrator's Office issued a notice that a hearing on the Petition for Revocation was scheduled for August 28, 2001 before the Honorable William J. Ober of the Court of Common Pleas of Westmoreland County.

22. On or about July 15, 2001, eight year old Annette Bright was shot and killed by means of a shotgun wound to the head.

23. Eight year old Annette Bright had a family relationship with the twelve year old victim of the aforementioned corrupting a minor charge.

24. On or about January, 2003, Defendant Koschalk entered a plea of guilty to the charge of first degree murder in the homicide of Annette Bright. He has been sentenced to life in prison without parole and is currently incarcerated.

25. A period of approximately ten weeks expired from the date on which the Probation Officer observed the direct violation of the Court Order and the time when the victim's relative, also a minor, was shot and killed. During this time, there was no arrest, detention, or service of papers upon Defendant Koschalk. This inexplicable delay was the responsbility of the processing system as administered by Defendants Probation Officers, Court Administrator, District Attorney and/or their staffs or personnel.

26. Approximately three weeks before the murder of Annette Bright, John Bright, related to the minors, contacted Officer Carl Franzaglio of the City of Monessen Police Department. Officer Franzaglio had been the prosecuting officer in the initial corruption of minors charge against

Defendant Koschalk.

27. Mr. Bright, aware that the probation officer had confronted Koschalk violating his probation by continued contact with the twelve year old victim, requested Officer Franzaglio to take immediate action to incarcerate Koschalk for the protection of his family. Defendant Officer Franzaglio assured Bright that immediate action would be taken. However, nothing occurred to detain Koschalk prior to the murder on July 15, 2001.

28. Koschalk murdered Annette Bright, in part, in retaliation for efforts made by the family to prevent him from seeing the twelve year old relative/victim of the corrupting minors charge.

COUNT I - CIVIL RIGHTS VIOLATIONS
(v. all Defendants except Koschalk)

29. The averments of paragraphs 1 through 28 above are here incorporated as though fully set forth at length.

30. As set out above, the actions of the Defendants, individually and/or jointly, created a state-created danger and/or otherwise violated the established special relationship between the government defendants and victim of the homicide resulting in legal harm to Annette Bright and her family. More particularly:

a. An express condition of probation was for Koschalk to have no unsupervised contact with the twelve year old victim of the corrupting morals charge and/or other minors.

b. The assigned probation officer had direct knowledge that a violation of that condition had occurred on or about May 4, 2001 and specifically confronted Koschalk regarding it.

c. Despite this confrontation, Koschalk was not detained, arrested, or even notified of a revocation process until several weeks after the homicide.

d. A family member of Annette Bright, fearing harm to the family, specifically requested an arrest to the prosecuting officer and received assurances that such action would be taken immediately.

e. These affirmative actions of the Defendants served to embolden Koschalk, who despite confrontation, saw no enforcement action. Additionally, assurances of action encouraged the family's reliance upon the authorities.

f. (1) The petition to revoke probation contains the following averments by Tammy Whalen:

> On May 4, 2001, at 20:09 this officer witnessed and confronted the defendant with the victim at the Target store in Greensburg. This is a direct violation of the court order. (emphasis added).

(2) Kolschalk had been charged with corrupting the morals of Marcy Bright (Annette's sister), for the act of keeping the child overnight in a truck in the woods without her parents' knowledge of her whereabouts. Koschalk had picked her up on March 4, 2000, without parental permission; took her shopping and kept her overnight in his pick-up.

(3) Koschalk had written letters addressed to "Nut", his nickname for Marcy. In part, one letter provided, as follows:

> "Feel real bad, like you really hate my guts. You don't understand, when I swear I will kill you, I mean that. You may tell your Mom and Dad or the police. By the time the cops knock on my door, I will be gone and you would better hope they catch me before I kill you and your family. I just will lose it, Nut, because I love you and will not let you go because we made plans to do things together."

(4) As noted above, the confrontation and failure of follow up, emboldened and/or encouraged Koschalk eventually to act on his misplaced emotional/psychological state. From his own correspondence his willingness to kill members of the Bright family would be encouraged when confronted with ineffective law enforcement responses, as occurred here.

(5) Such other matters as revealed by discovery.

g. Approximately three weeks before the homicide,

(1) John Bright went to the Monessen Police station and spoke directly to Officer Franzaglio. Bright asked Franzaglio why Koschalk wasn't in jail. Franzaglio said he didn't know, as certainly Bright or Franzaglio would be in jail under similar circumstances. Franzaglio said he was going to District Attorney Peck for a warrant for his arrest.

(2) In reliance upon these assurances, Bright failed to take defensive actions, such as leaving the area with his

family, hence creating the opportunity for the damages ultimately sustained.

h. The aforementioned acts, coupled with the inexplicable delay of nearly ten weeks in processing the revocation petition and/or the failure to initiate arrest and/or detention in the face of known probation violations, which violations created and/or should have created immediate concern for the safety of the affected minors constituted a state-created danger and/or violation of a special relationship and/or other duty owed to the victim and her family.

31. The homicide was directly and proximately caused by the affirmative acts and/or the deliberate indifference and/or failure to enforce, despite actual knowledge, the court-ordered conditions of probation. Further, the effect of direct confrontation with Koschalk, coupled with the aforementioned inexplicable delay emboldened Koschalk into believing that he would not confront effective law enforcement action as he progressed with his scheme to retaliate against the Bright family.

32. The actions of the Defendants (other than Defendant Koschalk), acting individually and/or in concert and/or otherwise jointly, deprived Annette Bright and her family of their civil rights including, but not limited to, the following:

a. Right to due process of law and/or otherwise entitlement to be free from state-created dangers and/or non-protection in violation of legally recognized special relationships;

b. Such other violations as revealed through

discovery and/or further development of the case.

33. The aforementioned Defendants lack immunity under the circumstances of this case since the aforementioned acts violate federal law and/or otherwise constitute administrative, clerical, and/or investigative conduct.

34. These actions have served to deprive plaintiffs of their civil rights, as previously outlined, under color of law and hence violate the United States Constitution and are actionable under 42 U.S.C. §1983.

35. Defendants Westmoreland County, Court Administrator, the City of Monessen and individual defendant officers have established, developed, ratified, approved or otherwise encouraged by and through its agents and/or employees, the following patterns of conduct creating policies or other de facto usages, customs, practices, and procedures, including the following:

a. Defendant City of Monessen has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediate arrest procedures and/or prompt processing of revocation petitions under circumstances evident in this case.

b. Defendant City encouraged the instant conduct by failing to take any disciplinary action whatsoever despite notice. As a result of these failures, Defendant City has failed to protect the public, including Plaintiffs, as outlined.

c. Defendant City fully ratified the conduct of police officers.

d. Westmoreland County and its policymakers including Defendant Court Administrator, has pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up in enforcement of probation violations, including but not limited to immediate arrest procedures, and/or prompt processing of revocation petitions under circumstances evident in this case.

36. As a result of the aforementioned, plaintiffs have been damaged as follows:

a. Funeral and other expenses cognizable under the law;

b. Lifetime loss of earnings, earning power, and/or capacity of decedent victim;

c. Pain, suffering, emotional distress, and/or terror of decedent prior to her death;

d. Parental/family pain, suffering and emotional loss;

e. Declaration of violation of rights;

f. Punitive damages;

g. Counsel fees and costs under 42 U.S.C. §1988.

WHEREFORE, Plaintiffs demand judgment against the Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT II - WRONGFUL DEATH
(v. all Defendants)

37. The averments of Paragraphs 1 through 36 are hereby incorporated as though fully set forth at length.

38. The facts previously outlined constitute the state tort of wrongful death. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

39. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 36.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT III - SURVIVORSHIP ACTION
(Plaintiff v. all Defendants)

40. The averments of Paragraphs 1 through 39 are hereby incorporated as though fully set forth at length.

41. The facts previously outlined constitute a survivorship action under state law. prosecution. The Court is requested to accept jurisdiction pursuant to the exercise of

PENDENT JURISDICTION.

42. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 36.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

COUNT IV - ASSAULT AND BATTERY
(v. Defendant Koschalk)

43. The averments of Paragraphs 1 through 42 are hereby incorporated as though fully set forth at length.

44. The facts previously outlined constitute the state tort of assault and battery resulting in death. This Court is requested to accept jurisdiction pursuant to the exercise of PENDENT JURISDICTION.

45. As a result of this conduct, Plaintiff suffered damages as previously outlined in Paragraph 36.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly, severally, and individually in an amount to be determined by the jury and costs and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

Respectfully submitted,

Date: February 4, 2005

By: s/Peter M. Suwak
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing First Amended Complaint was served by First Class Mail, postage prepaid, upon the following:

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